LIMITING JUDICIAL INCOMPETENCE: THE DUE PROCESS RIGHT TO A LEGALLY LEARNED JUDGE IN STATE MINOR COURT CRIMINAL PROCEEDINGS

> I don't know anything more about the law than a hog does about the Fourth of July.[1]
>
> —Justice Vernon Hilliard
> Marietta, California

I. INTRODUCTION

Lonnie North has taken his conviction for driving while intoxicated to the Supreme Court of the United States.[2] After his arrest in Lynch, Kentucky, in 1974, he received a trial in police court before C. B. Russell, a non-lawyer-judge. Judge Russell did not tell North of his right to have legal counsel, to confront witnesses against him, or to introduce evidence in his own behalf. When North demanded the jury trial guaranteed by a Kentucky statute,[3] the judge refused the request, relying solely on the prosecutor's advice. After hearing only the arresting officer, Judge Russell found the defendant guilty, fined him $150, revoked his driver's license and sentenced him to thirty days in jail.[4]

Judge Russell assumed his duties seven months before the trial and had no legal training.[5] In *North v. Russell*[6] North now claims that Kentucky's use of a non-lawyer-judge violated his due process right to a fair trial.[7] To help prove the violation, North cites this exchange between Russell and North's lawyer:

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[1] D. JACKSON, JUDGES 46 (1974).

[2] North v. Russell, No. 74-723 (Ky., Mar. 21, 1975), *prob. juris. noted*, 422 U.S. 1040 (1975).

[3] KY. REV. STAT. ANN. § 26.400 (1975).

[4] These facts come from appellant's United States Supreme Court brief because the Kentucky Court of Appeals' opinion, No. 74-723 (Ky., Mar. 21, 1975), does not include the facts of the case. The Commonwealth of Kentucky has accepted the appellant's statement of the facts. *See* Brief for Appellee at 3, North v. Russell, No. 74-1409 (U.S., filed May 9, 1975) [hereinafter cited as Brief for Appellee]. There is some question, however, whether Judge Russell informed the appellant of his right to counsel since the judge testified that he normally did so. *See* Jurisdictional Statement of Appellant at 33a-34a, North v. Russell, No. 74-1409 (U.S., filed May 9, 1975) [hereinafter cited as Jurisdictional Statement]. It is also unclear whether Judge Russell gave the appellant an opportunity to present his case. The judge testified that he did. *See* Jurisdictional Statement at 28a-29a. And one of appellant's own witnesses corroborated the judge's testimony. *See* Brief for New York State Association of Magistrates as Amicus Curiae at 4, North v. Russell, No. 74-1409 (U.S., filed May 9, 1975). Notwithstanding these discrepancies this note assumes the accuracy of the appellant's factual statement.

[5] *See* Jurisdictional Statement, *supra* note 4, at 16a-18a.

[6] No. 74-723 (Ky., Mar. 21, 1975), *prob. juris. noted*, 422 U.S. 1040 (1975).

[7] Besides challenging his conviction, North also claims that the *statute* authorizing the use

Lawyer: "Are you familiar with the 14th Amendment to the Constitution of the United States and as to what it provides?

Russell: Yes, sir.

Lawyer: "What does that provide?

Russell: "Right off hand, I don't—something about Judicial. I think one of them is judicial procedure or something another. I'm not for sure.

. . . .

Lawyer: "Are you familiar with the rights according [*sic*] to a defendant as accused in a criminal case under the 14th Amendment . . . ?

Russell: "Mr. Goss, as I previous [*sic*] said, I don't know, exactly understand this 14th Amendment. I know part of it.

. . . .

Lawyer: "Are you familiar with the Supreme Court reports [*sic*] of the United States Supreme Court?

Russell: "I'm familiar with some of them, but I don't agree with all of them."[8]

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of non-lawyer police court judges in small Kentucky cities violates the fourteenth amendment's due process clause. *See* Brief for Appellant at 8, North v. Russell, No. 74-1409 (U.S., filed May 9, 1975) [hereinafter cited as Brief for Appellant]. This note will not distinguish between challenges to convictions and challenges to entire judicial systems on due process clause grounds.

The appellant also alleges that Kentucky violates the equal protection clause of the fourteenth amendment by requiring lawyer-judges in larger cities and permitting non-lawyer-jurists in smaller cities. The California Supreme Court did not reach a similar issue in Gordon v. Justice Court, 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974), *cert. denied*, 420 U.S. 938 (1975), because it disposed of the case on due process grounds. *See id.* at 327 n.4, 525 P.2d at 74 n.4, 115 Cal. Rptr. at 634 n.4. The Kentucky Court of Appeals reached the argument in Ditty v. Hampton, 490 S.W.2d 772 (Ky.), *appeal dismissed as moot*, 414 U.S. 885 (1973), but rejected the argument. Employing a traditional equal protection analysis, the court found that three reasons provided a rational basis for the distinction. (1) Large cities have more financial resources than small cities to pay for lawyer-judges. (2) The more heavily populated areas can supply lawyer-judges more easily. (3) Larger cities have a greater need for lawyer-judges to dispose efficiently of heavier caseloads. *Id.* at 776.

The important question in equal protection analysis is whether a court will use the "rational basis" or "strict scrutiny" standard of review. *See, e.g.*, Shapiro v. Thompson, 394 U.S 618, 638 (1969). When courts invoke the rational basis test, equal protection claims usually fail because the state need only suggest a conceivable justification for the classification. *E.g.*, Ditty v. Hampton, 490 S.W.2d at 776. Under the strict scrutiny test, however, the state can prevail only if it can demonstrate a compelling state interest to support the classification. Korematsu v. United States, 323 U.S. 214 (1944). Relating to the lawyer-judge issue, a court would strictly scrutinize a classification like Kentucky's only if the right to a legally trained judge were considered a fundamental right, Reynolds v. Sims, 377 U.S. 533 (1964), or if the classification involved were inherently "suspect," Korematsu v. United States, 323 U.S. 214 (1944). Although this note will not deal further with the equal protection issue, it does examine whether a minimum level of judicial legal expertise is fundamental to a fair trial. This latter issue is relevant to the definition of equal protection as well as due process of law.

[8] Jurisdictional Statement, *supra* note 4, at 19a-21a, 25a.

The lack of due process in North's trial is not unique. In California's district courts, for example, the following events involved lay judges. A judge denied appointed counsel in a misdemeanor case even though the charge carried a 90-day maximum jail sentence. The layman did not believe the case was "important enough." Another judge discouraged requests for jury trials because "it just costs too much to give everybody all his rights." Another failed to determine and apply the law because, he said, "I don't have a law book in the office, and that isn't all—I don't want any. I do what I think is right . . ." "I am not a lawyer," explained one judge who admitted his inability to apply constitutional principles. Courtroom audiences were used as juries in some cases. Still another lay jurist relied on ex parte consultations with the district attorney's office to resolve complicated issues of law.[9] And most remarkably, one California judge was known to sniff witnesses because he believed he could identify an honest person by his scent.[10]

A study of Oregon's justices of the peace,[11] who are primarily lay judges, revealed similar violations of due process. Several continue the unconstitutional procedure of jailing indigents and crediting $25 per day served towards payment of a fine.[12] The study also found that justices often did not have copies of the *Oregon Revised Statutes* because they believed they could function adequately without them.[13] Many justices had difficulty with penalty provisions of Oregon's criminal statutes. In plea bargaining, for instance, they would offer to dismiss one of two charges in a case without realizing that a guilty plea to the remaining charge required imprisonment.[14]

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[9] Petitioner's Brief at 18-19, Gordon v. Justice Court, 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974), *cert. denied*, 420 U.S. 938 (1975).

In Frierson v. West, Civ. No. 74-1074 (D.S.C., May 15, 1975), the lay magistrate who was challenged knew little about the law. He was unaware of the purpose of bail and of the defendant's entitlement to it. He did not know what his duties for an appeal were, nor that he was required to prepare a record of the trial. The magistrate was unfamiliar with rules of evidence and with the concept of impeaching a witness's testimony. He believed that a plea of guilty made under the influence of alcohol or drugs could never be withdrawn. Not understanding the concept of constitutionality, he denied that a magistrate had the authority to declare a state law unconstitutional. Finally, in relation to jury trials, he knew neither the proper procedures nor the meaning of "reasonable doubt." Brief of the American Civil Liberties Union Foundation, Inc. as Amicus Curiae at 4-5 n.1, North v. Russell, No. 74-1409 (U.S., filed May 9, 1975). *See* McDonald, *South Carolina Magistrates: Justice Under a Willow Tree*, CIVIL LIBERTIES, April 1975, at 4, col. 1.

[10] D. JACKSON, *supra* note 1, at 46.

[11] Note, *Justice Courts in Oregon*, 53 ORE. L. REV. 411, 421 (1974)[hereinafter cited as *Justice Courts in Oregon*].

[12] Tate v. Short, 401 U.S. 395 (1971); *see Justice Courts in Oregon*, *supra* note 11, at 430 n.135.

[13] *Justice Courts in Oregon*, *supra* note 11, at 437 n.187.

[14] *Id.* at 428, 429 n.131.

Having accepted Lonnie North's appeal, the Supreme Court faces the issue of whether the use of non-lawyer-judges in state criminal courts of limited jurisdiction denies due process of law to defendants. It is a timely review. Since *Argersinger v. Hamlin*,[15] minor court lay judges increasingly have come under constitutional attack in both state[16] and federal[17] courts. The Supreme Court held in *Argersinger* that no criminal defendant charged with either a felony or a misdemeanor could be incarcerated without being afforded the right to counsel. Using this holding, petitioners have argued that the right to a lawyer-judge necessarily follows from the right to counsel. In order to understand legal counsel, the litigants submit, a judge must have legal training.[18] Otherwise, when the lay judge cannot follow a legal argument, he diminishes the value of the defense attorney and thus the efficacy of the *Argersinger* right.[19]

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[15] 407 U.S. 25 (1972). The constitutionality of the use of lay judges was attacked unsuccessfully prior to *Argersinger*. *E.g.*, Crouch v. Justice of the Peace Court, 7 Ariz. App. 460, 440 P.2d 1000 (1968)(lay judge instructing jury on law was not a denial of fundamental fairness); Decatur v. Kushmer, 43 Ill. 2d 334, 253 N.E.2d 425 (1969)(no authority ever held the right to an attorney-judge and therefore none was required); State v. Janco, 154 W. Va. 887, 180 S.E.2d 74 (1971)(dictum that right to lawyer-judge was a right not specified in the state constitution and therefore attorney-judges were not required). *See also* State v. Lynch, 107 Ariz. 463, 489 P.2d 697 (1971)(non-attorney justice of peace conducting preliminary hearing not a denial of due process); State v. Dziggel, 16 Ariz. App. 289, 492 P.2d 1227 (1972)(non-attorney justice of peace conducting felony preliminary hearing not a denial of due process).

[16] *See In re* Hewitt, 81 Misc. 2d 202, 365 N.Y.S.2d 760 (1975); Joseph W. (Anonymous) v. Burnham, Index No. 75-1291 (Onondaga Co., N.Y. Sup. Ct., 1975); Wyse v. Johnson, Index No. 74-34986 (Steuben Co., N.Y., Sup. Ct., 1975); Sanchez v. Tonkin, Index No. 75-8395 (Monroe Co., N.Y., Sup. Ct., 1975); Shelmidine v. Jones, No. 224948 (3d Jud. Dist. Salt Lake Co., Utah, June 3, 1975), *summarized in* 17 BNA CRIM. L. REP. 2282 (1975).

[17] Frierson v. West, Civ. No. 74-1074 (D.S.C., May 15, 1975) (dismissed for lack of standing) (for a discussion of this case see McDonald, *supra* note 9; Boone v. Dennis, No. 72J-118(N) (S.D. Miss., filed June 8, 1972); Davis v. Robbins, No. 72J-113 (S.D. Miss., filed June 1, 1972); Brown v. Vance, No. 72J-91(N) (S.D. Miss., filed May 12, 1972). The last three cases were consolidated for hearing and are still pending. For a discussion of these cases see Comment, *Constitutional Challenge to the Justice of the Peace Court in Mississippi*, 44 MISS. L.J. 996 (1973).

[18] *See* Gordon v. Justice Court, 12 Cal. 3d 323, 332, 525 P.2d 72, 78, 115 Cal. Rptr. 632, 638 (1974), *cert. denied*, 420 U.S. 938 (1975); Ditty v. Hampton, 490 S.W.2d 772, 774 (Ky.), *appeal dismissed as moot*, 414 U.S. 885 (1973).

[19] *See* Brief for the National Legal Aid and Defender Association as Amicus Curiae at 10, North v. Russell, No. 74-1409 (U.S., filed May 9, 1975). Several commentators have argued that judicial ignorance denies due process. *See, e.g.*, Dolan & Fenton, *The Justice of the Peace in Nebraska*, 48 NEB. L. REV. 457, 461-63 (1969); Giese, *Why Illinois Proposes to Abolish Justice of the Peace Courts*, 46 ILL. B.J. 754 (1958); Holden, *Justice Court Reform in Montana*, 34 MONT. L. REV. 122, 130-35 (1973); Keebler, *Our Justice of the Peace Courts—A Problem in Justice*, 9 TENN. L. REV. 1 (1930); Smith, *The Justice of the Peace System in the United States*, 15 CAL. L. REV. 118, 122-26 (1927); Sunderland, *A Study of the Justices of the Peace and Other Minor Courts*, 21 CONN. B.J. 300, 326-35 (1947); Vanlandingham, *The Decline of the Justice of the Peace*, 12 U. KAN. L. REV. 389 (1964); Note, *The Justice of the*

State courts have split over this corollary right argument. The Kentucky Court of Appeals rejected it in *Ditty v. Hampton*.[20] In an adversary system, according to the *Ditty* opinion, the need for defense counsel arises from the need to counterbalance the state's use of a lawyer-prosecutor. The Court did not see a similar need for a lawyer-judge because it found that a judge performs the neutral role of arbiter of the trial rather than the adversary role of prosecutor. The California Supreme Court disagreed, holding in *Gordon v. Justice Court*[21] that a criminal defendant[22] has a due process right to a lawyer-judge. In cases involving imprisonment, the right follows logically from *Argersinger*, according to the California justices. They concluded that only lawyer-judges can competently handle the difficult legal issues of minor court cases and thereby afford defendants a fair trial.

The Kentucky and California holdings present a difficult choice to the Supreme Court. On the one hand, requiring lawyer-judges will disrupt state judiciaries. Surveys in several states indicate that a substantial number of the nation's 15,000 minor court judges[23] have not passed the bar.[24]

Peace Court in Florida, 18 U. FLA. L. REV. 109 (1965). Nonetheless, lay judges have their defenders. *See* BROWNLEE, THE MONTANA JUSTICE OF THE PEACE AND POLICE JUDGE 103 (1970); Remarks of Willard Lorenson, Dean of the University of West Virginia Law School, reported in D. JACKSON, *supra* note 1, at 48-49.

[20] 490 S.W.2d 772 (Ky. 1973). It was followed in Waggoner v. Castleman, 492 S.W.2d 929 (Ky. 1973).

[21] 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974). This case has sparked several scholarly commentaries. *See* Comment, *Gordon v. Justice Court: The Quest for Competent Justices of the Peace*, 1975 ARIZ. ST. L. REV. 193; 63 CAL. L. REV. 227 (1975); Comment, *The Right to a Legally Trained Judge: Gordon v. Justice Court*, 10 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 739 (1975); 5 MEMPHIS ST. U.L. REV. 437 (1975); Note, *The Constitutionality of the Imposition of a Jail Sentence by a Lay Magistrate in South Dakota*, 20 S.D.L. REV. 456 (1975) [hereinafter cited as *Lay Magistrate in South Dakota*]; Comment, *The Justice of the Peace System Under Constitutional Attack—Gordon v. Justice Court*, 1974 UTAH L. REV. 861; 28 VAND. L. REV. 421 (1975); 11 WAKE FOREST L. REV. 124 (1975). *See also* Perry v. Banks, 521 S.W.2d 549, 550-56 (Tenn. 1975) (Henry, J., dissenting, and viewing the need for a legally trained judge in juvenile court proceedings as mandating a lawyer-judge requirement).

The trial court in Ditty v. Hampton, 490 S.W.2d 772, 773 (Ky.), *appeal dismissed as moot*, 414 U.S. 885 (1973), agreed with the California Supreme Court, as did the trial court in Shelmidine v. Jones, No. 224948 (3d Jud. Dist., Salt Lake Co., Utah, June, 3, 1975), *summarized in* 17 BNA CRIM. L. REP. 2282 (1975).

[22] In State v. Williams (Tenn. App., June 27, 1975) the court held that when incarceration is actually imposed in a juvenile proceeding an attorney-judge must preside to protect fundamental fairness guaranteed by the fourteenth amendment of the United States Constitution and Art. 1, § 8 of the Tennessee constitution. It specifically rejected the notion that the right to an attorney-judge extended to other court proceedings.

[23] AMERICAN JUDICATURE SOCIETY, COURTS OF LIMITED JURISDICTION: A NATIONAL SURVEY 3 (Final Draft 1975)[hereinafter cited as NATIONAL SURVEY].

[24] *E.g.*, *California*: District Court Judges, 81 attorneys, 108 laymen as of March 1974, Gordon v. Justice Court, 12 Cal. 3d 323, 327 n.3, 525 P.2d 72, 74 n.3, 115 Cal. Rptr. 632, 634 n.3 (1974); *Iowa*: 52.8% of the magistrates responding to a survey were non-lawyers, *see* Green,

The percentage of laymen on the bench is most significant in rural America.[25] Replacing them with lawyers, in the short run, may slow the judicial process which handles 90 percent of all criminal matters and a majority of all criminal trials and sentences.[26] In the long run, it may require substantial expenditures for salaries[27] and could force consolidation of jurisdictions.[28] If the Supreme Court upholds convictions by untrained judges, however, judicial ignorance may continue to preclude fair trials and future Lonnie Norths may go to jail in violation of their right to due process.

The following discussion will examine the choices faced by the Supreme Court. It will first consider whether the due process clause of the fourteenth amendment[29] permits the states to grant judicial power to laymen who

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Ross, & Schmidhauser, *Iowa's Magistrate System, The Aftermath of Reform*, 58 JUDICATURE 381, 383 (1975); *Kentucky*: Justices of the Peace, 4 attorneys, 601 non-attorneys; Police Court Judges, 41 attorneys, 146 non-attorneys (78.1% non-attorneys); County Judges, 14 attorneys, 106 non-attorneys (88.4% non-attorneys), Jurisdictional Statement, *supra* note 4, at 35a. *Missouri*: No more than 75 out of approximately 400 municipal or police court judges are lawyers, NATIONAL SURVEY, *supra* note 23, at 320-21; *New York*: 987 non-lawyer judges out of 2,420 Town and Village Judges, *see* Oelsner, *Nonlawyer Judges Under Attack*, N.Y. Times, June 2, 1975, at 16, col. 4; *South Dakota*: Justices of the Peace: of those responding to a 1970 survey, only two of 203 were lawyers, *Lay Magistrate in South Dakota*, *supra* note 21, at 459; *Tennessee*: 80 of 95 county judges are non-lawyers, Perry v. Banks, 521 S.W.2d 549, 553 (Tenn. 1975).

[25] The problem of lay judges appears to be principally a suburban and rural problem. A 1962 survey of several cities revealed the following distribution of lay judges in metropolitan areas: Boise, Idaho, four in the satellite area; Charleston, South Carolina, two in city, nine in satellite area; Grand Fork, North Dakota, two in city; Las Vegas, Nevada, two in city, six in satellite area; Phoenix, Arizona, one in city; Wichita Falls, Texas, two in city. M. VIRTUE, SURVEY OF METROPOLITAN COURTS FINAL REPORT 203 (1962). This may result from the requirement in some states, such as Kentucky, that all judges in large cities be attorneys. *See* note 38 *infra*.

[26] NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS 161 (1973)[hereinafter cited as NATIONAL ADVISORY COMMISSION].

[27] *See* text accompanying notes 215-16 *infra*.

[28] *See* text accompanying notes 217-19 *infra*.

[29] This note is limited to discussing the due process problem created by lay judges presiding in state courts. For clarity and manageability it will not deal directly with the issue of whether the due process clause of the fifth amendment permits the federal government to grant judicial power to laymen who have not demonstrated competence to conduct a fair trial. Nevertheless, the analysis of this note is applicable to the federal context. Even though the law governing the appointment of federal magistrates requires them to be lawyers, it has an exception when a lawyer is not available to serve. Then, a layman can be appointed. 28 U.S.C. § 631(b)(1) (1970). There are at least five non-lawyer part-time magistrates although the total number is unknown. Oelsner, *supra* note 24, at 16, col. 4. The federal statutes governing the appointment of circuit court judges, 28 U.S.C. § 44 (1970), and district court judges, 28 U.S.C. § 133 (1970), do not require the appointment of lawyers. Article III of the federal Constitution is likewise silent on any legal qualifications for Supreme Court justices. It does

have not demonstrated competence to conduct a fair trial.[30] It will then evaluate alternative methods of guaranteeing a due process right of a fair trial to criminal defendants.

II. Background

All states have courts of limited jurisdiction at the lowest level of their judicial systems. Called lower courts, minor courts, district courts, or inferior courts, these forums handle minor civil cases, inquests, initial appearances, bail hearings, preliminary felony hearings, and trials of minor crimes and ordinance violations. Judges, titled justices of the peace, magistrates, aldermen, district judges, or municipal court judges, preside over the proceedings. Their sentencing power is usually quite restricted. Fines normally may not exceed $1,000, and maximum prison sentences may range from ten days to 18 months.

Although these courts are limited in jurisdiction, they affect the public significantly.[31] They try between four and five million misdemeanor cases annually[32] in addition to 50 million traffic offenses.[33] Because of their heavy criminal caseload, they are

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not appear, however, that there is much likelihood that non-lawyer federal judges and Supreme Court justices would be confirmed by the Senate.

[30] This note is limited to the context of criminal trials. Although its arguments may apply to civil trials and preliminary criminal proceedings, the discussion does not attempt to analyze the due process concerns in these different settings.

Lay judges do preside over civil trials in state minor courts. Recent constitutional challenges to their use have failed. Melikian v. Avent, 300 F. Supp. 516 (N.D. Miss. 1969); State *ex rel.* Reece v. Gies, 198 S.E.2d 211 (W. Va. 1973). But the question remains: do adjudications which are arbitrary and capricious because judges cannot handle legal issues deny due process? *See* Note, *The Justice of the Peace: Constitutional Questions*, 69 W. Va. L. Rev. 314, 323-26 (1967).

The states also empower lay judges to issue warrants, to hold preliminary hearings, and to conduct bail hearings. When making a probable cause determination for a warrant, the judge is the final constraint on the power of the state to interfere in the private affairs of an individual. When he decides whether the state has a prima facie case to hold a defendant for trial, the judge can impose the burden of the criminal process on a citizen. And when he sets bail, he decides whether the defendant retains his physical freedom. Although the importance of these determinations justifies including them within the due process analysis, this note will not resolve these issues and will examine only the trial context.

[31] For basic information on minor courts see National Survey, *supra* note 23; American Judicature Society, An Assessment of the Courts of Limited Jurisdiction (1968). *See generally* H. Abraham, Courts & Judges (1959); C. Callender, American Courts 32-33, 51 (1927); National Advisory Commission, *supra* note 26, at 160.

[32] President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Courts 55 (1967) [hereinafter cited as The Courts].

[33] *See* Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 Iowa L. Rev. 1249, 1261-62 (1970). The makeup of lower court caseloads varies. In the metropolitan criminal courts of Boston, there was this breakdown:

> [the] points of contact with the administration of justice of the overwhelming majority of the inhabitants who come into contact with courts and court officials. There the great bulk of the population receives its impression regarding the speed, certainty, fairness and incorruptibility of justice as administered.[34]

Justice Roger Traynor more recently echoed this theme:

> Trial courts of limited jurisdiction, including justice of the peace courts, have unlimited capacity to affect public attitudes toward law for better or worse. It is these courts, not the appellate courts, that the people generally know firsthand. What they observe there of justice or injustice, or efficiency or bumbling, determines whether they will look upon the courts with respect and pride or cynicism.[35]

Despite the importance of the lower court judge to American justice, there is no agreement among the states about qualifications for appointment or election. Nine states require all of their judges to be lawyers.[36] Eight have no such requirement for minor court judges, and five of the eight also require no training in legal procedure in judicial decision-

CRIME	PERCENTAGE
Theft & Robbery	36%
Robbery	4%
Assault	16%
Danger to person	9%
Non-support	7%
Narcotics	10%

LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE QUALITY OF JUSTICE IN THE LOWER CRIMINAL COURTS OF METROPOLITAN BOSTON, 19 (1970) [hereinafter cited as QUALITY OF JUSTICE].

In rural areas the make-up of the case load is somewhat different. In Oregon, for example, the justices of the peace who continue functioning primarily in rural areas had case loads in which 82% of the violations involved traffic offenses. The next most numerous were for violations of fish and game laws. *See Justice Courts in Oregon*, *supra* note 11, at 420-21.

[34] CLEVELAND FOUNDATION, CRIMINAL JUSTICE IN CLEVELAND 88 (R. Pound and F. Frankfurter eds. 1922), *quoted in* THE COURTS, *supra* note 32, at 29.

[35] Traynor, *Rising Standards of Courts and Judges*, 40 CALIF. ST. B.J. 677, 688-89 (1965).

[36] *Alabama*: district court, ALA. CONST. art. 6, § 146, and municipal court, *id.* art. 6, § 145; *Connecticut*: court of common pleas, CONN. GEN. STAT. ANN. § 51-47 (Supp. 1975); *Hawaii*: district court, HAWAII REV. STAT. § 604-2 (Supp. 1974); *Illinois*: judges and associate judges, ILL. CONST. art. 6, § 11; *Maine*: district court, ME. REV. STAT. ANN. tit. 4, § 157 (1964); *Maryland*: district court, MD. CONST. art. IV, §§ 2, 41C; *Michigan*: district court, MICH. COMP. LAWS. ANN. § 600.8201 (Supp. 1975-76), and Detroit Court of Common Pleas, *id.* § 728.3; *Nebraska*: county court, NEB. REV. STAT. § 24-505 (Supp. 1974), and municipal court, *id.* § 26-103 (1964); *Virginia*: general district court, VA. CODE ANN. § 16.1-69.15 (1975), and juvenile and domestic relations court, *id.* §§ 16.1-69.15, -153.1.

[37] As used herein, "minor court" refers to a court whose jurisdiction does not include felonies or offenses involving over $1,000. *Arizona*: justice court, police court, ARIZ. CONST.

making.[37] The remaining 33 states require some but not all of their lower court judges to be lawyers.[38]

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art. 6, § 31; *Idaho*: magistrates division (district court), must attend institute on the functions of the magistrates office, IDAHO CODE § 1-2206(3) (Supp. 1975); *Massachusetts*: district court, Boston Municipal Court, juvenile court, MASS. ANN. LAWS ch. 218, § 6 (1958); *Nevada*: municipal court, justice courts, justices taking office after July 1, 1971, must take a course offered by the National College of State Trial Judges, NEV. REV. STAT. §§ 4.035-.036 (1973), as must municipal court judges and police judges taking office after that date, NEV. REV. STAT. §§ 5.025-5.026 (1973); *New Hampshire*: district court (the judge should be a lawyer if possible), N.H. REV. STAT. ANN. § 502A:3 (1968), municipal court, "learned, able and discreet person," *id.* § 502:1; *North Carolina*: district court, N.C. GEN. STAT. ANN. § 7A-140 (1969), magistrates, *id.* § 7A-171 (Supp. 1974); *West Virginia*: magistrate court judges taking office after November 5, 1974, must have completed a course of instruction on rudimentary legal principles, W. VA. CODE ANN. § 50-20-4 (Supp. 1975).

[38] *Alaska*: bar admission: district court, ALASKA STAT. § 22.15.160 (1962); no legal qualification: magistrate court; *Arkansas*: bar admission: municipal court, ARK. STAT. ANN. §§ 22-704, -704.4 (Supp. 1973); no legal qualification: justice of the peace, city court, police court; *California*: bar admission: municipal court, CAL. CONST. art. 6, § 15; passage of qualifying examination: justice court, CAL. GOV'T CODE § 71601 (West 1964); *Colorado*: bar admission: county court of class A and B counties, COLO. REV. STAT. ANN. § 13-6-203(2) (1973); municipal court (whenever possible but not required), *id.* § 13-10-106; attend institute on duties and functions of county court: county court of class C and D counties, *id.* § 13-6-203(3)-(4); *Delaware*: bar admission: court of common pleas, DEL. CODE ANN. tit. 10, § 1302(b) (1974); family court, *id.* § 906; Municipal Court of Wilmington, *id.* § 1702(b); no legal qualification: justice court; *Florida*: bar admission: county court in counties over 40,000 population, FLA. CONST. art. 5, §§ 8, 20(c)(11); no legal qualification: county court in counties under 40,000 population, or where candidate is an incumbent magistrate or justice of the peace; *Georgia*: bar admission: court of ordinary in counties over 196,000 population (except for clerks of court of ordinary with five years current experience), GA. CODE ANN. § 24-1711.1 (Repl. Pt. 1975); no legal qualification: county court, city court, justice of the peace, municipal court, recorder's court, police court, mayor's court; *Indiana*: bar admission or experience as a judicial officer: criminal court, IND. ANN. STAT. § 33-13-9-1 (1975); Municipal Court of Marion County, *id.* § 33-6-1-12; county court, *id.* § 33-5.5-1-2; juvenile court, *id.* § 33-13-9-1; no legal qualification: justices of the peace, city court; *Iowa*: bar admission: full-time judicial magistrates, IOWA CODE § 602.52 (1975); school of instruction: part-time judicial magistrates, *id.* § 602.50; *Kansas*: bar admission: city court, KAN. STAT. ANN. §§ 20-1425, -1505, -1604, -2404 (1974); magistrates court, *id.* §§ 20-1806, -1910, -2503; police courts, municipal courts in first class cities, *id.* § 12-4105 (Supp. 1974); Sedgwick County Court of Common Pleas, *id.* § 20-2001 (1974); no legal qualification: county court, municipal court in second class cities; *Kentucky*: bar admission: police court of cities of first class, KY. REV. STAT. ANN. § 26.140 (Repl. Pt. 1975); no legal qualification: county court, quarterly court, justice court, police court of cities of the 2d, 3d, 4th, 5th and 6th classes; *Louisiana*: bar admission: Municipal Court of New Orleans, LA. CONST. art. 7, § 94; LA. REV. STAT. ANN. § 13:2492 (1968); city court, *id.* § 13:1873; parish court, *id.* § 13:2561.5 (Supp. 1975); juvenile court, *id.* §§ 13:1564, :1596 (1963); Family Court of East Baton Rouge, LA. CONST. art. 7, § 53; Traffic Court of New Orleans, *id.* § 94; no legal qualification: justice of the peace, municipal or mayor's court: *Minnesota*: bar admission: county court, MINN. STAT. ANN. § 487.03 (Supp. 1975); learned in law: municipal court, *id.* § 488.06 (1971); no legal qualification: justice courts; *Mississippi*: bar admission: county court, MISS. CONST. art. 6, § 154; MISS. CODE ANN. § 9-9-5 (1972); family court, MISS. CONST. art. 6, § 154; MISS. CODE ANN. § 43-23-39 (Supp. 1974); municipal

police court, *id.* § 21-23-3; completion of training seminar: justice of the peace, *id.* § 7-5-59 (1972); *Missouri*: bar admission: magistrate court, MO. CONST. art. 5, § 25; municipal court of first class city, MO. ANN. STAT. § 80.260 (Supp. 1975); of fourth class city, *id.* § 98.500 (1971); St. Louis Court of Criminal Correction, *id.* § 479.050 (1952); no legal qualification: all other police or municipal courts, *id.* §§ 73.410, 98.030, 98.500 (1971), § 81.195 (Supp. 1974); *Montana*: bar admission: municipal court, MONT. CONST. art. VIII § 16; MONT. REV. CODES ANN. § 11-1704 (Supp. 1974); completion of orientation course if not incumbent: justice court, *id.* § 93-401; *New Jersey*: bar admission: county district court, N.J. STAT. ANN. § 2A:6-8.1 (Supp. 1975); juvenile and domestic relations court, *id.* § 2A:4-4a (1975); bar admission or residency in municipality: *id.* § 2A:8-7 (1952); *New Mexico*: bar admission: small claims court, N.M. STAT. ANN. § 16-5-3 (1953); magistrates court in districts with 100,000 population, *id.* § 36-2-1; completion of training course: municipal court, *id.* § 37-1-10 (Supp. 1973); magistrates courts, *id.* § 36-2-4 (1953); *New York*: bar admission: county court, family court, New York City Criminal Court, district court, city court, N.Y. CONST. art. 6, § 20; completion of training course: town or village court, *id.* § 20(c); N.Y. JUSTICE CT. ACT § 105 (Supp. 1974-75); *North Dakota*: learned in law: district court, N.D. CONST. art. 4, § 107; county court, *id.* §§ 111, 107; bar admission: county justice court, N.D. CENT. CODE § 27-18-02 (1960); attorney unless none are available: municipal court for cities over 3,000, *id.* § 40-18-01 (Supp. 1973); no legal qualification: municipal court in cities under 3,000; *Ohio*: bar admission: county court, OHIO REV. CODE ANN. § 1907.051 (Page 1968); municipal court, *id.* § 1901.06 (Page Supp. 1973); Juvenile Court of Cuyahoga County, *id.* § 2153.02 (Page Supp. 1968); no legal qualification: mayor's court, Police Court of Ottawa Hills; *Oklahoma*: bar admission: municipal criminal court of record, OKLA STAT. ANN. tit. 11, § 783 (Supp. 1974-75); district courts, OKLA. CONST. art. 7, § 9; municipal court not of record for towns over 7,500 pop. if available, OKLA. STAT. ANN. tit. 11, § 958.7 (Supp. 1974-75); no legal qualification: municipal court not of record for towns under 7,500 or where no attorney is available; *Oregon*: bar admission: district court, ORE. REV. STAT. § 46.610 (1974); no legal qualification: municipal or city court, county court, justice court; *Pennsylvania*: completion of course of instruction: district judges, justices of the peace, and traffic judges of Philadelphia, PA. STAT. ANN. tit. 42, §§ 1212, 1214 (Supp. 1975-76); *Rhode Island*: bar admission: district court, R.I. GEN. LAWS ANN. § 8-8-7 (Supp. 1974); no legal qualification: family court, justice of peace; *South Carolina*: bar admission: county court, S.C. CODE ANN. § 15-605 (1962); family court, *id.* § 15-1095.3(b) (Supp. 1974); civil and criminal court, *id.* §§ 15-1504, -1585.1, -1591.2, -1631.3 (1962); no legal qualification: magistrate court, municipal court; *South Dakota*: law trained: one magistrate in each of five designated circuits, S.D. COMPILED LAWS ANN. § 16-12A-3.1 (Supp. 1975); attendance at institute: all other magistrates unless waived by the state supreme court, *id.* § 16-12A-8; *Tennessee*: bar admission: general sessions court (58 of 91 counties), TENN. CODE ANN. §§ 16-1105, 17-119 (Supp. 1974); no legal qualification: remaining courts of general sessions, juvenile court, city court, justice of the peace court; *Texas*: bar admission: Wichita Falls Municipal Court, TEX. REV. CIV. STAT. ANN. art. 1200aa, § 4 (Supp. 1974-75); Angelina County Court, *id.* art. 1970-355, § 4(a); Hunt County Court, *id.* art. 1970-354, § 4(a); Nueces County Court No. 3, *id.* art. 1970-339, 339C, § 4(a); Travis County Court at Law Nos. 1, 2, and 3, *id.* arts. 1970-324, § 6 (1964), -324a, § 6 (1964), -324a.1, § 6 (Supp. 1974-75); well informed on state law: county court, TEX. CONST. art. 5, § 15; completion of 40-hour course and yearly supplement: justice court, TEX. REV. CIV. STAT. ANN. art. 5972 (Supp. 1974-75); no legal qualification: municipal court (except Wichita Falls); *Utah*: bar admission: juvenile court, UTAH CODE ANN. § 55-10-70 (1953); city court, *id.* § 78-4-8; no legal qualification: justice court; *Vermont*: bar admission: district court, VT. STAT. ANN. tit. 4, § 602 (1972); no legal qualification: justice court; *Washington*: bar admission: justice court in districts greater than 10,000 population, WASH. REV. CODE ANN. § 3.34.060 (Supp. 1974) (or prior judgeship); municipal court in cities greater than 5,000 pop., *id.* § 3.50.040; passage of examination: justice court in districts less than 10,000, *id.* § 3.34.060; no legal requirement:

III. The Application of the Due Process Clause To Minor Court Judges

The fourteenth amendment forbids the states to "deprive any person of life, liberty, or property, without due process of law."[39] The Supreme Court has never precisely defined "due process of law," preferring to describe the term only in general phrases. One early opinion explained that due process embodies the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[40] In later cases the Court held that the clause guaranteed rights "basic in our system of jurisprudence"[41] and, most relevant to this note, those fundamental rights "essential to a fair trial."[42]

On a case-by-case basis, the Court has given meaning to the clause. Its decisions indicate that procedures creating a substantial likelihood of unfairness in a criminal trial violate the amendment per se.[43] To resolve whether the use of untrained, untested, and unsupervised lay judges violates due process, then, this note will analyze three questions—(1) whether

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municipal court in city less than 5,000, justice court commissions; *Wyoming*: bar admission: county court, Wyo. Stat. Ann. § 5-114.14 (Supp. 1975); justice court, *id.* § 5-99.1; no legal qualification: municipal court.

[39] U.S. Const. amend. XIV, § 1.

[40] Powell v. Alabama, 287 U.S. 45, 67 (1932), *quoting* Hebert v. Louisiana, 272 U.S. 312, 316 (1926).

[41] *In re* Oliver, 333 U.S. 257, 273 (1948).

[42] Gideon v. Wainwright, 372 U.S. 335, 340 (1963), *quoting* Betts v. Brady, 316 U.S. 455, 471 (1942). Justice Rehnquist has stated: "The Due Process clause of the Fourteenth Amendment has long been recognized as assuring 'fundamental fairness' in state criminal proceedings." Herring v. New York, 422 U.S. 853, 866 (1975) (Rehnquist, J., dissenting). "A fair trial in a fair tribunal is a basic requirement of due process." *In re* Murchison, 349 U.S. 133, 136 (1955). " A right to a fair trial is a right admittedly protected by the due process clause of the Fourteenth Amendment." Adamson v. California, 332 U.S. 46, 53 (1947). "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." Lisenba v. California, 314 U.S. 219, 236 (1941).

[43] *See, e.g.*, Ward v. Village of Monroeville, 409 U.S. 57 (1972) (traffic offender tried before the mayor of a town that was heavily dependent on traffic fines); Argersinger v. Hamlin, 407 U.S. 25 (1972) (state denied counsel to indigent defendant on misdemeanor charge); Duncan v. Louisiana, 391 U.S. 145 (1968) (state denied jury trial for a serious crime); Bruton v. United States, 391 U.S. 123, 135-37 (1968) (in a joint trial a co-defendant's confession admitted into evidence with an instruction to the jury to disregard it while deciding guilt of other defendant, even though the second did not have the opportunity to cross-examine the co-defendant) Pointer v. Texas, 380 U.S. 400 (1965) (state denied defendant the opportunity to confront opposing witness); Turner v. Louisiana, 379 U.S. 466 (1965) (state used deputy sheriff as both jury custodian and a key prosecution witness); Jackson v. Denno, 378 U.S. 368 (1964) (procedure permitted jury both to determine whether defendant's confession was voluntary and to decide the question of guilt); Gideon v. Wainwright, 372 U.S. 335, (1963) (state denied indigent defendant in felony trial the right to appointed counsel); *In re* Murchison, 349 U.S. 133 (1955) (contempt trial conducted before same judge who presided at the grand jury hearing during which alleged contempt occurred).

vesting such lay judges with judicial power is likely to deny criminal defendants a fair trial, (2) whether the denial of fairness is substantial in the minor court setting, and (3) whether the Court's decisions defining due process in criminal proceedings and the likelihood of unfairness require a per se rule against the use of such judges.

A. Denying a Fair Trial

In a criminal trial on the merits, defendants are entitled to a strict observance of rules designed to bring about a fair verdict.[44] A fair criminal trial includes at least three elements. (1) The defendant must receive all of his constitutional and statutory procedural rights under both state and federal law. (2) The tribunal must decide the case according to the substantive requirements of statutory and constitutional law.[45] (3) The presiding judge must be unbiased.[46] The application of these elements and the responsibility for ensuring fairness rests first with the presiding trial judge.[47] When that judge is a layman, untrained, untested, and unsupervised, only his common sense and good faith can guarantee the defendant a fair determination of guilt. The following examination of these elements reveals, however, that the lay judge probably will not remain free from bias nor provide a hearing in accordance with the procedural and substantive requirements of fairness by relying only on his common sense.

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[44] Costello v. United States, 350 U.S. 359, 364 (1956).

[45] Cases developing the due process right to counsel attempt to ensure substantively accurate decisions and to prevent guilty verdicts against innocent defendants. *See* Argersinger v. Hamlin, 407 U.S. 25, 31 (1972); Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963); Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

In his concurring opinion in Estes v. Texas, 381 U.S. 532, 557 (1965), Chief Justice Warren noted that the purpose of criminal procedure is "to provide a fair and reliable determination of guilt." *See* Note, *The Justice of the Peace: Constitutional Questions*, *supra* note 30, at 324, in which the author cites Roberts v. New York City, 295 U.S. 264 (1935), for the proposition that a gross and obvious error approaching the boundary of arbitrary action denies due process. *See generally* Morrissey v. Brewer, 408 U.S. 471, 489 (1972) (due process requires at least a written statement by the factfinder about the evidence and reasons for revoking parole); Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (conclusions about the eligibility of welfare benefits must rest solely on legal rules and evidence adduced at a hearing; a decisionmaker must state the reasons for the determination and indicate the dispositive evidence in order to demonstrate compliance with that requirement).

[46] *See* Ward v. Village of Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927).

[47] *See* Estes v. Texas, 381 U.S. 532, 548 (1965) ("[The trial judge's] job is to make certain that the accused receives a fair trial"); Glasser v. United States, 315 U.S. 60, 71 (1942) ("Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused"); Johnson v. Zerbst, 304 U.S. 458, 465 (1938) ("The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel").

1. Procedural Requirements

To ensure procedural fairness, a judge must have a reliable guide to constitutional, statutory, and common law procedural requirements. Not only must he be aware of the proper procedures but he must also be able to understand and evaluate legal arguments. A brief summary of the procedural requisites of a fair trial shows that common sense and literacy alone do not qualify a judge to meet his responsibility to provide procedural fairness.

The Supreme Court has declared certain procedures essential to fairness in criminal proceedings. If the defendant desires to plead guilty, the judge must personally ascertain that the plea is voluntarily and intelligently made by informing the defendant of the consequences of the plea and by questioning the defendant.[48] Unless the judge is aware of this obligation and can understand the common law or statutory provisions defining the offense and its penalty, he will not likely meet the requirements of due process regarding guilty pleas.

If the defendant pleads not guilty, he has many constitutional procedural rights, among them the right to a public[49] and speedy trial[50] with compulsory process for obtaining witnesses,[51] the right to confront and cross-examine opposing witnesses,[52] the right to a jury trial when the offense carries a jail sentence of more than six months,[53] the right to counsel if he is to be imprisoned,[54] and the right to protection against racial bias by questioning and challenging prospective jurors.[55] State statutes and constitutions may provide additional procedural rights.[56] A judge relying

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[48] *See* Boykin v. Alabama, 395 U.S. 238, 243-44 (1969).

[49] *In re* Oliver, 333 U.S. 257 (1948).

[50] Klopfer v. North Carolina, 386 U.S. 213 (1967).

[51] Washington v. Texas, 388 U.S. 14 (1967).

[52] Pointer v. Texas, 380 U.S. 400 (1965).

[53] Baldwin v. New York, 399 U.S. 66 (1970).

[54] Argersinger v. Hamlin, 407 U.S. 25 (1972).

[55] Ham v. South Carolina, 409 U.S. 524 (1973).

[56] For example, many states provide jury trials for petty offenses even though they are not required by the Constitution: *Arizona*, ARIZ. REV. STAT. ANN. § 22-320 (1956); *Arkansas*, ARK. STAT. ANN. § 44-210 (Repl. Vol. 1964); *California*, CAL. CONST. art. 1, § 7 (district court, except in cases involving potential imprisonment); *see* Gordon v. Justice Court, 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974); *Colorado*, COLO. CONST. art. II, §§ 16, 23; *Idaho*, IDAHO CODE § 19-1902 (Supp. 1975); *Indiana*, IND. ANN. STAT. § 33-11-1-42 (1975); *Iowa*, IOWA CODE ANN. § 762.15 (Supp. 1975); *Kentucky*, KY. REV. STAT. ANN. §§ 25.014, 26.400 (1969); *Minnesota*, MINN. R. CRIM. P. 26.01(1)(a) (misdemeanors punishable by incarceration); *Mississippi*, MISS. CODE ANN. § 99-33-9 (1972); *Missouri*, MO. ANN. STAT. §§ 98.080, 98,550 (1971); *Montana*, MONT. REV. CODES ANN. § 95-2204 (Repl. Vol. 1969); *Nevada*, NEV. CONST. art. 1, § 3; *New Mexico*, N.M. STAT. ANN. § 36-10-1 (Repl. Vol. 1972); *New York*, N.Y. CONST. art. 1, §2; *Ohio*, OHIO CONST. art. 1, §5; *Oregon*, ORE. REV. STAT. § 156.110 (Repl. Pt. 1973); *Pennsylvania*, PA. STAT. ANN. tit. 42, § 725 (1966); *Rhode Island*, R.I. GEN. LAWS ANN. § 12-

on his own instincts to resolve legal issues will probably not conclude intuitively that he must follow all of these procedures. Yet without defense counsel,[57] intuition may be his only guide.[58] Where the defendant has counsel, the judge must possess a minimum level of competence to understand and evaluate the lawyer's arguments. Otherwise, the right to counsel is of little use.[59] For instance, if the judge does not understand that he is bound by Supreme Court decisions, he might reject valid requests for constitutional protections.

2. *Substantive Fairness*

Substantive fairness also requires more than mere literacy and common sense from the presiding judge. A fair trial must conclude with a verdict

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17-3 (1969); *South Carolina*, S.C. CODE ANN. § 43-115 (1962); *Texas*, TEX. CODE CRIM. PRO. arts. 45.24, 45.25 (1966); UTAH CODE ANN. § 77-27-2 (1953); *Vermont*, VT. STAT. ANN. tit. 32, § 1517 (1970); *Washington*, WASH. REV. CODE ANN. § 10.04.050 (1961); *West Virginia*, W. VA. CONST. art. 3, § 14; *Wyoming*, WYO. STAT. ANN. § 7-420 (1957).

[57] This statement also applies when counsel is provided but proves ineffective. *See* MacKenna v. Ellis, 280 F.2d 592, 600 (5th Cir. 1960), *modified*, 289 F.2d 928 (5th Cir. 1961), *cert. denied*, 368 U.S. 877 (1961) ("Fundamental fairness to a person accused of crime requires such judicial guidance of the conduct of a trial that when it becomes apparent appointed counsel are not protecting the accused, the trial judge should move in and protect him"); COMMENT, *The Right to a Legally Trained Judge: Gordon v. Justice Court*, *supra* note 21, at 751-54. *See also* Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1115-16 (1973); Gitelson & Gitelson, *A Trial Judge's Credo Must Include His Affirmative Duty to Be an Instrumentality of Justice*, 7 SANTA CLARA LAW. 7 (1966); Note, *Judicial Intervention in Trials*, 1973 WASH. U.L.Q. 843.

[58] Glasser v. United States, 315 U.S. 60, 71 (1942) ("Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused"); Johnson v. Zerbst, 304 U.S. 458, 465 (1938) ("The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel").

Even when the defendant waives his right to counsel, a judge is not relieved of his obligation to ensure fairness actively. *See* Faretta v. California, 422 U.S. 806, 839 (1975) (Burger, C.J., dissenting):

> Although we have adopted an adversary system of criminal justice, . . . the trial judge is not simply an automaton who insures that technical rules are adhered to. [He is] charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial.

See also Grubbs v. State, 255 Ind. 411, 265 N.E.2d 40 (1970).

[59] Chief Justice Warren quoted Justice Holmes while concurring in Estes v. Texas, 381 U.S. 532, 560 (1965):

> [E]ven though "every form [be] preserved" the forms may amount to "no more than an empty shell" when considered in the context or setting in which they were actually applied.

The Court has said that the right to counsel embodies a right to effective counsel. *See, e.g.*, Tollett v. Henderson, 411 U.S. 258 (1973); McMann v. Richardson, 397 U.S. 759 (1970); Michel v. Louisiana, 350 U.S. 91 (1955); Reece v. Georgia, 350 U.S. 85 (1955).

and penalty that accord with substantive state and federal constitutional, statutory, and common law.[60] It is not fair to convict a defendant unless the state has proven the charges against him beyond a reasonable doubt.[61] A judge must know this rule and, where applicable,[62] be able to convey it to a jury.

The Supreme Court has declared that it is unfair to convict a defendant unless the state has provided proof of every element of the offense charged.[63] Determining the elements of a crime is not always a simple process and requires the ability to read and understand both statutory and case law.[64] Common sense will not likely enable a judge to isolate the crucial elements of an offense or make him aware of the necessity to isolate the elements and demand proof for each. To ensure proper proof—proof not based on irrelevant or untrustworthy evidence—the trial judge must have a reliable method to determine the rules of evidence in any proceeding before him. For instance, unless the judge understands the hearsay rule and its numerous exceptions, the accused may be convicted although there is little or no admissible evidence against him.[65] Even if the defendant is fairly convicted, the judge must analyze statutes and case law to determine the proper penalty.

A judge must understand and be able to apply certain established constitutional principles in order to protect a defendant's substantive constitutional rights. His fourth amendment right to be free from unreasonable searches and seizures is of little avail when the trial judge is unaware that illegally seized evidence must be excluded from the trial.[66] If the judge cannot apply the fifth amendment's prohibition of compulsory incrimination, the defendant may be convicted without proper proof of each element of the offense charged, and his fifth amendment protection may be useless.[67] Fundamental fairness at trial also requires the protection of a defendant's first amendment liberties.[68]

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[60] *See* cases cited note 45 *supra*.

[61] *In re* Winship, 397 U.S. 358 (1970).

[62] See note 56 *supra* for a list of states providing jury trials in minor courts.

[63] Vachon v. New Hampshire, 414 U.S. 478 (1974); *see* Thompson v. City of Louisville, 362 U.S. 199, 204 (1960).

[64] *See* Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965), where an overbroad interpretation of a state criminal statute led a judge to permit conviction even though the state had not offered evidence for every element necessary to limit the offense to within constitutionally permissible bounds.

[65] *See* Gibbs v. Burke, 337 U.S. 773 (1949) (unrepresented defendant denied due process when convicted after the admission of hearsay and other incompetent evidence).

[66] *Cf.* Mapp v. Ohio, 367 U.S. 643 (1961).

[67] *Cf.* Malloy v. Hogan, 378 U.S. 1 (1964).

[68] See Fiske v. Kansas, 274 U.S. 380 (1927), *cited in* Duncan v. Louisiana, 391 U.S. 145, 148 (1968), for the statement that the due process clause of the fourteenth amendment protects "the rights of speech, press and religion covered by the First Amendment."

3. Bias

A fair trial also requires an unbiased decisionmaker. Forcing a defendant to stand trial before a judge who depends upon the fines he imposes for his income violates due process per se.[69] The Court has also found such a violation when the judge is an important official of a municipality that is dependent upon fines for a substantial part of its income.[70] Further, due process is violated by trying a defendant for contempt before the same judge who cited him for contempt[71] or before a judge who has just lost a civil rights suit to the defendant.[72]

A judge without legal expertise can become biased easily. If he relies on his common sense to solve legal issues, his personal prejudices and biases will likely affect his decisions.[73] If he seeks independent legal advice, he will probably contact the lawyer with whom he is most familiar. In many cases this will be someone associated with the local prosecutor or police. When a judge depends upon a prosecuting attorney for legal guidance, he will likely become biased in favor of the prosecutor and against defendants.[74]

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[69] Tumey v. Ohio, 273 U.S. 510 (1927).

[70] Ward v. Village of Monroeville, 409 U.S. 57 (1972).

[71] *In re* Murchison, 349 U.S. 133 (1955).

[72] Johnson v. Mississippi, 403 U.S. 212 (1970).

[73] *See* Smith, *The Justice of the Peace System in the United States*, *supra* note 19, at 127-28:

> With no training in the law, no training in the process of judicial thought, no mental habit of mind which is acquired only by constant experience in legal reasoning, it would indeed be strange if a justice of the peace did not treat each case as a unique proposition. He has no category or class into which he may place it, no analogies from which to draw to solve the new problem before him. He has no legal rules, principles or standards by which to judge the merits of the controversy to be decided. Wholly unlike the judge who is trained in the law, he has no precedents to guide him. In deciding the cause before him, the justice is necessarily limited by his own personal experience acquired in the short span of a single lifetime. He cannot call on the legal experience of the ages to assist him but is helpless to do any more than apply his own personal notions of right and wrong to the case at hand. The justice which such a tribunal is capable of dispensing is but the outcropping of the experiences of a personality, often limited and warped by passion and prejudice, and at best, as variable as the personalities of the justices who comprise the justice of the peace system. . . . Such justice is not justice at all. It is "unequal, uncertain, and capricious."

The type of decision-making process Smith describes is what is often called "common sense." It is the type of justice some lay judges themselves believe the public wants. *See* Giese, *supra* note 19, at 758.

[74] *See, e.g.*, *Justice Courts in Oregon*, *supra* note 11, at 430. The Oregon study found that justices of the peace tended to rely on law enforcement personnel to explain legal issues in preliminary hearings and that the result was a prosecutor-orientation on the part of the justices. One justice was unconcerned about his lack of a copy of *Oregon Revised Statutes* because he had the police to explain the law to him. *See also* text at note 4 *supra*. *Cf.* People v. Rhodes, 12 Cal. 3d 180, 524 P.2d 363, 115 Cal. Rptr. 235 (1974) (part-time city prosecutor appointed as defense counsel rendered ineffective assistance of counsel). *But cf.* Faretta v.

Consequently, unless the judge possesses a minimum of legal expertise or has a neutral source of legal information, there is a likelihood of bias and unfairness in trials before him.

B. The Substantiality of Unfairness

Theoretically there is a likelihood of unfairness when a judge without legal expertise tries a minor case. It might be argued, however, that trials involving petty offenses in fact are so uncomplicated that there is no substantial need for a minimum level of judicial expertise. Thus, the argument goes, a trial involving a petty offense before an untrained and untested lay judge does not violate the fourteenth amendment. This assertion is misconceived, however. Due process does require a minimum level of judicial legal expertise.

To begin with, the need to prevent bias and to ensure procedural and substantive fairness exists in every trial, no matter how petty the offense. The judge must afford the accused most of the procedural rights of felony defendants and therefore must read and understand statutes and constitutional case law. Even traffic offenses can involve the right to a speedy and public trial, to confront and cross-examine witnesses, to refuse self-incrimination, and to receive the assistance of counsel.[75] In *North v. Russell* the judge was "not cognizant of the various constitutional, statutory, and common-law substantive and procedural rights guaranteed the [defendant] as a citizen of Kentucky and as a citizen of the United States of America."[76] Although the judge may have possessed "a whole lot of common sense,"[77] he did "not possess the necessary knowledge, understanding, training or experience to enable him to protect the defendant's . . . constitutional, statutory, and common law substantive and procedural rights."[78]

North also illustrates a trial setting that can lead to biased decisionmaking. The city prosecuting attorney, rather than the judge, decided the legal questions that emerged during the trial.[79] The unfairness resulting from the use of such an untrained, untested, and unsupervised lay judge is not unique to *North*.[80]

Minor trials also present a variety of difficult substantive questions for

California, 422 U.S. 806, 839 (1975) (Burger, C.J., dissenting) (prosecution is charged with ensuring that fairness is provided the defendant).

[75] For instance, some of these procedures may have been necessary for the defendant to advance his substantive arguments in *Gordon v. Justice Court*. *See* text at note 83 *infra*.

[76] Brief for Appellant, *supra* note 7, at 11.

[77] Jurisdictional Statement, *supra* note 4, at 26a.

[78] Brief for Appellant, *supra* note 7, at 11.

[79] *See id.* at 10.

[80] *See* text at notes 9-14 *supra*.

the lay judge. Each trial requires that he read and understand case law. First, he must determine the elements of the crime[81] and the appropriate range of penalties.[82] The state must then prove each element of the offense beyond a reasonable doubt. The high standard of proof magnifies the importance of evidentiary questions. One of the defendants in *Gordon v. Justice Court*, for instance, might have challenged his drunken driving charge by contesting either the accuracy of the scientific apparatus which measured his blood alcohol or the qualifications of those administering the test.[83] The California Supreme Court noted the substantial possibility that "a non-attorney judge would have been unable to rule properly on the admissibility of the evidence."[84] By not ruling properly, however, the judge could have denied the defendant a substantively fair verdict by considering inaccurate evidence.

In addition to statutory, common-law, and evidentiary questions of substantive fairness, misdemeanor trials often require the application of complex substantive constitutional protections. In *Argersinger v. Hamlin*[85] the Supreme Court noted that petty offenses "often bristle with thorny constitutional questions."[86] Holding a layman incapable of defending himself against a misdemeanor charge without the aid of counsel,[87] the Court rejected the argument that misdemeanor cases actually leading to imprisonment are "any less complex" than felony cases.[88] The majority illustrated the point with *Papachristou v. City of Jacksonville*,[89] where an alleged petty offense arose from an unconstitutionally vague statute.[90] Despite any defense argument, a lay judge who does not understand the supremacy of Supreme Court decisions might convict a defendant under a local ordinance identical to the one in *Papachristou*. The *United States Reports* contain a substantial number of misdemeanor cases dealing with important constitutional issues.[91]

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[81] *See* Vachon v. New Hampshire, 414 U.S. 478 (1974); Shuttlesworth v. Birmingham, 382 U.S. 87 (1965); Thompson v. Louisville, 362 U.S. 199 (1960); *cf.* Comment, *The Right to a Legally Trained Judge: Gordon v. Justice Court*, *supra* note 21, at 753.

[82] *See* Gordon v. Justice Court, 12 Cal. 3d 323, 331, 525 P.2d 72, 77, 115 Cal. Rptr. 632, 637 (1974).

[83] *See* Brief for Petitioner at 14-15, Gordon v. Justice Court, 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974).

[84] Gordon v. Justice Court, 12 Cal. 3d 323, 331, 525 P.2d 72, 77, 115 Cal. Rptr. 632, 637 (1974).

[85] 407 U.S. 25 (1972).

[86] *Id.* at 33.

[87] *Id.* at 36-37.

[88] *Id.* at 33.

[89] 405 U.S. 156 (1972) (municipal vagrancy ordinance involving 90-day jail sentence was so vague as to violate due process).

[90] *Id.* at 162.

[91] *See, e.g.*, Vachon v. New Hampshire, 414 U.S. 478 (1974) (conviction under statute

One argument against the preceding analysis about the substantiality of unfairness springs from *Shadwick v. Tampa*.[92] Finding a municipal court clerk to be a "neutral and detached magistrate," the Court ruled in *Shadwick* that he could issue arrest warrants without violating the fourth and fourteenth amendments. Additionally, the Court found no reason to hold the clerk incompetent to issue warrants because "[o]ur legal system has long entrusted nonlawyers to evaluate more complex and significant factual data" than that considered in the warrant process.[93] Although *Shadwick* refused to invalidate per se warrants not issued by a lawyer or a judge,[94] it did not declare an untrained, untested, and unsupervised layman qualified to conduct a criminal trial. Furthermore, the Court's recognition of the complexity of factual deliberations of jurors[95] did not extend to an endorsement of a layman's ability to try a defendant for a petty offense. Neither grand nor petit jurors must resolve legal arguments or

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forbidding contribution to delinquency of a minor, punishable by a maximum $500 fine and one year imprisonment, reversed because of lack of evidence of a crucial element of the offense); Gooding v. Wilson, 405 U.S. 518 (1972) (misdemeanor statute banning the use of opprobrious words and abusive language tending to cause a breach of the peace held an unconstitutionally vague and overbroad infringing of freedom of speech); Coates v. Cincinnati, 402 U.S. 611 (1971) (ordinance forbidding three or more people to assemble on a sidewalk or in certain other public areas and there to conduct themselves in a manner annoying to people nearby, involving a maximum fine of $50 and a maximum jail sentence of 30 days, held (1) so vague as to violate due process and (2) so overbroad as to infringe freedom of assembly and association); Schmerber v. California, 384 U.S. 757 (1966) (misdemeanor conviction for driving under the influence of alcohol upheld because the blood sample taken over defendant's objections did not deny him due process, his right against compulsory self-incrimination, assistance of counsel, or his right against unreasonable searches and seizures); Shuttlesworth v. Birmingham, 382 U.S. 87 (1965) (conviction for obstructing sidewalk in violation of city ordinance reversed because it may have rested on an unconstitutionally overbroad interpretation of the ordinance; conviction for violation of ordinance prohibiting the disobedience of a police officer's order "to move on" reversed because the total lack of evidence as to guilt denied due process); Hamm v. Rock Hill, 379 U.S. 306 (1964) (convictions based on misdemeanor statutes requiring individuals to leave premises on demand reversed on the grounds that the subsequent passage of the 1964 Civil Rights Act granted defendants the right to patronize the establishments involved in the case); Bouie v. City of Columbia, 378 U.S. 347 (1964) (conviction based on criminal trespass statute reversed because an unforeseeable and retroactive broadening of the range of prohibited activity denied due process); Thompson v. Louisville, 362 U.S. 199 (1960) (conviction based on ordinance forbidding loitering and disorderly conduct reversed because the total lack of evidence made the conviction a denial of due process); District of Columbia v. Clawans, 300 U.S. 617 (1937) (conviction for dealing in second hand personal property without a license, punishable by a maximum fine of $300 or 90 days in jail, reversed because the restriction of cross-examination prevented a fair trial).

[92] 407 U.S. 345 (1972). *See* Brief of Appellee, *supra* note 4, at 19; Brief of New York State Association of Magistrates as Amicus Curiae, *supra* note 4, at 17.

[93] 407 U.S. at 351-52.

[94] *Id.* at 352.

[95] *Id.*

determine the technical requirements of due process of law. They depend upon a judge or prosecutor for guidance on legal issues. Unlike judges, jurors are not required to engage in a precise, rational decision-making process. Consequently, *Shadwick* should not apply to questions about the competency of lay judges. Finally, the Court assumed without holding that a municipal clerk could capably issue a warrant by virtue of his office.[96] It did not declare a person with no legal experience competent even for the relatively simple task of issuing a warrant. Nor did it deal with the more complicated trial setting.

In summary, a substantial likelihood of procedural unfairness, judicial bias, and substantive error exists when a judge without legal expertise conducts a minor court trial. It therefore is not reasonable to assume that lay judges can provide due process of law in such criminal proceedings through common sense alone.

C. *The Justification for a Per Se Due Process Rule*

Although untrained, untested, and unsupervised lay judges will likely create substantial unfairness in minor court criminal proceedings, their trials will not necessarily violate the due process clause. Arguably, due process of law does not include any minimum standard of judicial competence. First, the Constitution does not require that each defendant receive a perfect trial in the first instance.[97] Even the most highly qualified judge probably will not conduct every trial without making procedural or substantive mistakes or without being influenced by personal prejudice. The appellate process usually can correct the errors. The right to appeal is arguably an adequate remedy for any prejudice resulting from a lay judge's lack of competence. Second, the Constitution does not contain any explicit minimum qualifications for presiding judges. In fact, rather than imposing minimum standards of judicial competence, the Constitution appears to give the President and the Senate freedom even to select Supreme Court justices without regard to competence.[98] Furthermore, there is no evidence that the drafters of the Constitution or the fourteenth amendment intended to alter the historical role of untrained lay magistrates. It is arguable, therefore, that the right to determine the qualifications of state court judges belongs to the states under the tenth amendment.[99] The states consequently may have the discretion to prefer the rough justice rendered

[96] *Id.* at 351.

[97] *See* Bruton v. United States, 391 U.S. 123, 135 (1968); Beck v. Washington, 369 U.S. 541, 554-55 (1962), *quoting* Milwaukee Elec. Ry. & Light Co. v. Wisconsin *ex rel.* City of Milwaukee, 252 U.S. 100, 106 (1920).

[98] *See* U.S. CONST. art. II, § 2; Gordon v. Justice Court, 108 Cal. Rptr. 912, 923-24 (App. 1973), *rev'd*, 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974).

[99] *See* U.S. CONST. amend X; *cf.* Fay v. New York, 332 U.S. 261, 294 (1947).

by lay magistrates to the procedural and substantive accuracy provided by minimally qualified judges.

These arguments, however, do not preclude the establishment of a per se prohibition of criminal trials before a judge with no legal expertise. The Court occasionally has deferred to the states on questions of criminal procedure[100] and sometimes has looked to history[101] and to the text of the Bill of Rights[102] for insight into the meaning of due process of law. But it has never adopted a policy of complete deference to state discretion nor confined the definition of due process to historic practices or to the text of the first eight amendments. The Court has not established a precise test for determining when to apply a per se due process rule. The decisions setting forth the minimum requirements of due process rest upon a variety of considerations: historical Anglo-American concepts of justice, the adequacy of appeal as an assurance of fairness, and the need for economy and efficiency in criminal justice and law enforcement. To determine whether a criminal trial before an unsupervised, untested, and untrained lay judge in a minor state court is a per se violation of due process of law, these factors must receive consideration.

1. Historical Concepts of Justice

The argument that trials before lay judges with no legal expertise do not violate the fourteenth amendment per se because lay judges are an historical part of Anglo-American justice has some merit. Lay judges have handled petty criminal proceedings in America from the colonial period[103] and have performed similar tasks in England for 600 years.[104] Consequently, the drafters and ratifiers of the fourteenth amendment probably did not intend in 1868 to impose minimum standards of judicial competence on the states. The Court has given weight to the "settled usages and modes of proceeding"[105] in Anglo-American jurisprudence as it has defined the minimum requirements of due process of law.[106] In *Duncan v. Louisiana*,[107] for instance, the decision that due process included the option of a jury trial in

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[100] *See, e.g.*, Fay v. New York, 332 U.S. 261 (1947); Snyder v. Massachusetts, 219 U.S. 97 (1934).

[101] *See* note 108 *infra*.

[102] *See* note 109 *infra*.

[103] L. FRIEDMAN, A HISTORY OF AMERICAN LAW 45 (1973); J. HURST, THE GROWTH OF AMERICAN LAW: THE LAWMAKERS 147-48 (1950).

[104] 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 286-92 (7th ed. A. Goodhart & H. Hanbury eds. 1956).

[105] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277 (1856).

[106] *See, e.g.*, Powell v. Alabama, 287 U.S. 45, 60-65 (1932); Tumey v. Ohio, 273 U.S. 510, 523-31 (1927).

[107] 391 U.S. 145, 151-54, 160-61 (1968).

cases involving serious criminal offenses rested primarily on the historic role of juries in criminal cases. Other decisions defining fourteenth amendment due process have also relied, at least in part, on historical analysis[108] or the language of the Bill of Rights.[109]

But the Court has not limited due process to the rights contained explicitly in the Bill of Rights[110] or in any other "permanent catalogue of what [has] at a given time [been] deemed the limits or the essentials of fundamental rights."[111] For instance, due process of law includes the right to represent oneself in a criminal trial,[112] the requirement of proof beyond a reasonable doubt before incarceration,[113] the right to testify on behalf of oneself,[114] the right of a defendant to be present at all stages of the trial

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[108] *See, e.g.*, Faretta v. California, 422 U.S. 806, 821-32, (1975) (historical right of self-representation); Tumey v. Ohio, 273 U.S. 510, 524 (1927) (historical right to judge with no pecuniary interest in the subject matter he is to decide); Hurtado v. California, 110 U.S. 516 (1884) (no historical precedent for requirement of indictment by grand jury).

[109] *See, e.g.*, Washington v. Texas, 388 U.S. 14, 18 (1967) (sixth amendment right to compulsory process applied to states); Pointer v. Texas, 380 U.S. 400, 403-04 (1965) (sixth amendment right of confrontation and cross-examination applied to states); *In re* Oliver, 333 U.S. 257 (1948) (sixth amendment right to a public trial applied to states).

[110] *See In re* Winship, 397 U.S. 358 (1970); Adamson v. California, 332 U.S. 46 (1947); Palko v. Connecticut, 302 U.S. 319 (1937); Twining v. New Jersey, 211 U.S. 78 (1908).

Inclusion of a right not enumerated in the first eight amendments within the ambit of the due process protection can be justified in terms of three doctrines. The first is the so-called "incorporation plus doctrine." It holds that due process includes all of the Bill of Rights protections but is not limited to them. *See* Poe v. Ulman, 367 U.S. 497, 516 (1961) (Douglas, J., dissenting); Adamson v. California, 332 U.S. 46, 124 (1947) (Murphy, J., dissenting). The second is the "fundamental rights doctrine," which holds that due process describes those principles "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled*, Benton v. Maryland, 395 U.S. 784 (1969) (rights deemed necessary for fundamental fairness); *see* Duncan v. Louisiana, 391 U.S. 145, 172 (1968) (Harlan, J., dissenting). The principles may not be rooted in any time period but can become necessary as standards of society advance. Wolf v. Colorado, 338 U.S. 25, 27 (1949), *overruled*, Mapp v. Ohio, 367 U.S. 643 (1961). Under this theory it can be argued that whereas prior to the expansion of constitutional rights during the past four decades lay judges were able to handle criminal trials fairly, now with the expansion in criminal procedural protections, this view is no longer tenable. *See* Gordon v. Justice Court, 12 Cal. 3d 323, 327-28, 525 P.2d 72, 75, 115 Cal. Rptr. 632, 635 (1974). The third approach is to argue that under the penumbral theory advanced in Griswold v. Connecticut, 381 U.S. 479 (1965), the right to a lawyer-judge comes under the penumbra of the sixth amendment right to counsel. The problem with this approach is that *Griswold* dealt with a definition of what aspect of liberty was protected by due process rather than with whether a procedural protection should be afforded a criminal defendant. Since the right to a trial before a lawyer-judge is closely analogous to other procedural protections, it would seem to follow that the appropriate test to determine whether the right is constitutionally mandated by due process is whether it is necessary for a fair trial.

[111] Wolf v. Colorado, 338 U.S. 25, 27 (1949), *overruled*, Mapp v. Ohio, 367 U.S. 643 (1961).

[112] Faretta v. California, 422 U.S. 806 (1975).

[113] *In re* Winship, 397 U.S. 358 (1970).

[114] *See* Brooks v. Tennessee, 406 U.S. 605 (1972); Harris v. New York, 401 U.S. 222 (1971).

when his absence might frustrate the fairness of the proceedings,[115] and the right to a trial before an unbiased judge not financially dependent on the fines imposed.[116] Although the historical meaning of the right to counsel is the privilege of retaining counsel when one desires and can afford one,[117] the Court has expanded the right to counsel in trials involving jail sentences to include the right to appointed counsel for indigents.[118] Furthermore, in *Jackson v. Denno*[119] the Court made no inquiry into "settled usages and modes of proceeding" when it found that joint determination by a jury of the guilt of the defendant and of the voluntariness of his confession violated due process.[120] The Court noted instead that the complexity of the voluntariness decision had increased as notions about trial fairness had developed. The changes required a separate determination of voluntariness.[121] In short, the Court has expanded the concept of due process fairness far beyond that reflected in the judicial process prior to the adoption of the fourteenth amendment.[122]

Although it may have once been justifiable to entrust minor criminal proceedings to the common sense of lay judges, the justifications no longer exist. When the justice of the peace system began in America, there were few lawyers outside major cities.[123] Travel and communication were slow and difficult.[124] The concept of fairness in criminal trials did not approach the complexity of current standards of due process of law.[125] Entrusting minor criminal proceedings to lay magistrates was therefore a reasonable

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[115] Snyder v. Massachusetts, 291 U.S. 97 (1934).

[116] Tumey v. Ohio, 273 U.S. 510 (1927).

[117] *See* Betts v. Brady, 316 U.S. 455, 466 (1942), *overruled on other grounds*, Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45, 68 (1932).

[118] Argersinger v. Hamlin, 407 U.S. 25 (1972) (misdemeanors where imprisonment is imposed); Gideon v. Wainwright, 372 U.S. 335 (1963) (felonies).

[119] 378 U.S. 368 (1964).

[120] *Id.* at 377.

[121] *Id.* at 389-91.

[122] *See* Gerstein v. Pugh, 420 U.S. 103 (1975) (accused has a right to a judicial determination of probable cause for his arrest as a prerequisite to an extended restraint of liberty following arrest); *In re* Gault, 387 U.S. 1 (1967) (due process rights of notice, counsel, privilege against self-incrimination, and confrontation through cross-examination of opposing witnesses are applicable to proceeding where juveniles are charged as delinquents and faced with possible commitment to a state institution); Miranda v. Arizona, 384 U.S. 436 (1966) (confessions obtained from a defendant during custodial control by the state may not be used against him in trial unless he was first advised of his rights to remain silent, to have his attorney present during questioning, and to have counsel appointed if he is indigent or unless he voluntarily and intelligently waives these rights).

[123] *See* Gordon v. Justice Court, 12 Cal. 3d 323, 327, 525 P.2d 72, 75, 115 Cal. Rptr. 632, 635 (1974).

[124] *See id.* at 327, 525 P.2d at 75, 115 Cal. Rptr. at 635.

[125] *See* Jackson v. Denno, 378 U.S. 368, 389-91 (1964); Gordon v. Justice Court, 12 Cal. 3d 323, 327, 525 P.2d 72, 75, 115 Cal. Rptr. 632, 635 (1974).

method of providing justice. In the twentieth century, however, criminal proceedings have increased in complexity; legal training has become more readily available to rural areas;[126] and modes of travel and communication have improved.[127] Consequently, substantial practical barriers no longer prevent the use of judges with minimum legal competence,[128] and states can no longer reasonably rely on common sense and justice-of-the-peace manuals[129] to provide fair trials.[130] Several jurisdictions have recognized the need for judges capable of conducting proceedings in accordance with expanded notions of fairness. Nine states require all judges to pass the bar exam,[131] and nine have instituted training and testing programs for their judiciaries.[132]

These new requirements are not alien to Anglo-American jurisprudence. Even before the advent of the English justice-of-the-peace system, the

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[126] *See* text at notes 226-43 *infra*.

[127] *See* Gordon v. Justice Court, 12 Cal. 3d 323, 328, 525 P.2d 72, 75, 115 Cal. Rptr. 632, 635 (1974).

[128] *See* text at notes 226-43 *infra*.

[129] Comment, *The Right to a Legally Trained Judge: Gordon v. Justice Court*, *supra* note 21, at 754.

[130] *See generally* Gordon v. Justice Court, 12 Cal. 3d 323, 328, 525 P.2d 72, 75, 115 Cal. Rptr. 632, 635 (1974).

[131] *See* note 36 *supra*.

[132] The following states require non-lawyer-judges to complete a course of instruction: *Colorado*, county court judges of class C and D counties must attend an institute on the duties and function of their courts, COLO. REV. STAT. ANN. § 13-6-203 (1973); *Idaho*, magistrate division judges of the district courts must attend an institute on the function of the magistrate's office unless attendance is waived by the supreme court, IDAHO CODE § 1-2206(3) (Supp. 1975); IOWA, judicial magistrates of the district court must attend a school of instruction administered by the supreme court unless excused by the chief justice for good cause, IOWA CODE ANN. § 602.50 (1975); *Mississippi*, justices of the peace must attend an 18-hour seminar conducted by the state attorney general, MISS. CODE ANN. § 7-5-59 (1972); *Montana*, justice court judges must complete an orientation course conducted by the University of Montana Law School, MONT. REV. CODES ANN. § 93-401 (Supp. 1974); *Nevada*, justice court and municipal court judges taking office after July 1971 must enroll in course offered by the National College of State Trial Judges, NEV. REV. STAT. §§ 5.025-5.026 (1973); *New Mexico*, municipal court judges must complete annually a training program conducted by the court administrator unless excused by the chief justice, N.M. STAT. ANN. § 36-2-4 (Repl. Vol. 1972); *New York*, non-lawyer-judges in town and village courts must complete a training course, N.Y. CONST. art. 6, § 20(c), N.Y. JUSTICE CT. ACT § 105 (McKinney Supp. 1974-75); N.Y. TOWN LAW § 31 (McKinney Supp. 1974-75); *Pennsylvania*, justices of the peace must complete a training course and pass a qualifying examination, PA. CONST. art. V, § 12(b); PA. STAT. ANN. tit. 42, §§ 1211-17 (Supp. 1975-76); *Texas*, justice court judges must complete a 40-hour training course before assuming their positions and a 20-hour course each year thereafter, TEX. REV. CIV. STAT. art. 5972 (Supp. 1974-75).

Although Kentucky has no requirement that non-lawyer-judges receive training, a course is provided through the Department of Justice, Bureau of Training, with specific reference to the new Criminal Code of Kentucky. Letter from Howard E. Trent, Jr., Director of the Administrative Office of the Courts, October 24, 1974.

English sovereign promised in the Magna Carta that he would "not make men justices, constables, sheriffs, or bailiffs, unless they are such as know the law of the realm, and are minded to observe it rightly."[133] Actually, the promise conformed with English practice, since judges were generally landed gentry who knew the law and had the assistance of clerks of the peace.[134] Although the Magna Carta has not prevented the use of untrained lay judges in England,[135] the provision indicates that a concern for judicial competence is not foreign to the common-law concept of justice.

Although the American Constitution does not refer to judicial competence, the concept of "a trial" in the sixth amendment might imply a minimum standard.[136] The drafters of the sixth amendment right to a trial in all criminal proceedings had no need to specify any requirement of judicial competence. They could reasonably entrust criminal proceedings to the common sense of lay judges since the concept of fairness was relatively undeveloped and legal expertise relatively unavailable.[137] Thus, the eighteenth-century lay judge could probably provide eighteenth-century due process. Now that due process has expanded, "a trial" under the sixth amendment today should mean a proceeding before a judge competent to provide twentieth-century due process. Such an argument is no more contrary to the intent of the drafters than an assertion that the right to counsel today means a right to an appointed attorney for an indigent defendant facing imprisonment.[138]

Finally, in *Shadwick v. Tampa*[139] the Supreme Court indicated that due process requires judges to possess a minimum of legal expertise. Although the case did not focus primarily on the magistrate clerk's competence to make a probable cause determination, it stated in dicta that magistrates must be "capable of the probable cause determination required of them."[140] A fortiori, magistrate judges should also be capable of conducting a fair trial.

In summary, then, the historical argument against requiring competent judges in the 1970's has only superficial appeal. The Court has not limited its conception of due process of law under the fourteenth amendment to

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[133] *See* Gordon v. Justice Court, 12 Cal. 3d 323, 334, 525 P.2d 72, 79, 115 Cal. Rptr. 632, 639 (1974).

[134] T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 168 (5th ed. 1956).

[135] The majority of magistrates in England today are laymen. *See* Ditty v. Hampton, 490 S.W.2d 772, 775 (Ky.), *appeal dismissed as moot*, 414 U.S. 885 (1973).

[136] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ." U.S. CONST. amend. VI.

[137] *See* text accompanying notes 123-25 *supra*.

[138] *See* Argersinger v. Hamlin, 407 U.S. 25 (1972); *cf.* Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932).

[139] 407 U.S. 345 (1972).

[140] *Id.* at 354.

judicial procedures of the mid-nineteenth century. Since the need for a legally competent minor court judiciary has increased since then, and since the justifications for the use of lay judges have dissipated, the historical argument should have little effect on whether trials before such judges deny due process per se.

2. Adequacy of Appeal

The Constitution does not give defendants the right to a perfect trial. To correct judicial errors, each state provides an appellate criminal process. But appeals do not alleviate the type of unfairness that results from judicial incompetence in minor criminal courts, and the decisions defining due process indicate that procedures creating such unfairness violate the fourteenth amendment per se.

The Nature of the Unfairness. The appellate process does not ensure that defendants receive due process of law from lay judges in minor courts for two reasons. First, there are significant barriers to appeal. Studies of minor courts indicate that relatively few convicted persons actually appeal.[141] The low incidence of appeals cannot be dismissed as an indication that most defendants are satisfied with the treatment they receive in lower courts. The fines levied for petty offenses usually do not exceed the attorney fees, bond expense, court costs, and other costs required to appeal. Even though a defendant feels that he is being deprived of property without due process of law, it is often cheaper for him to pay the fine than appeal.[142] When the defendant faces a short jail sentence, he may rather

[141] A 1973 study of Massachusetts courts revealed that only one percent of those convicted appealed to a trial de novo. Note, *The De Novo Procedure—Assessment of Its Constitutionality Under the Sixth Amendment Right to Trial by Jury and the Due Process Clause of the Fourteenth Amendment*, 55 BOSTON U.L. REV. 25, 51 (1975) [hereinafter cited as *The De Novo Procedure*]. Another made in 1968 of Boston's metropolitan criminal court showed that only 20 percent of those found guilty appealed, even though most of those who asserted their rights were either acquitted or given lighter sentences. QUALITY OF JUSTICE, *supra* note 33, at 4 n.8, 108. A somewhat older study found that in most cities only five percent of those found guilty in lower criminal courts appealed. Note, *Metropolitan Criminal Courts of First Instance*, 70 HARV. L. REV. 320, 349 (1956).

[142] Some individuals may feel that paying a minor fine is better than paying the cost of appeals. *See* Banyon, *Justice Courts on Trial*, 37 MICH. ST. B.J., May 1958, at 35; Note, *The Justice of the Peace Court in Florida*, *supra* note 19, at 119; Note, *The Justice of the Peace: Constitutional Questions*, *supra* note 30, at 325; *cf.* Bratton, *It's in the Basement*, 3 TENN. B.J., May 1967, at 12. Some individuals simply may not have enough money to pay for an appeal. *The De Novo Procedure*, *supra* note 141, at 51. For example, a study of Boston's lower criminal courts revealed that 55 percent of the defendants earned less than $75 a week; 23 percent earned between $76 and $100; and 22 percent earned more than $100. QUALITY OF JUSTICE, *supra* note 33, at 124-25 app. A. Such incomes are facially inadequate to hire a lawyer costing between $150 and $250. *The De Novo Procedure*, *supra* note 141, at 51.

lose a few days' wages than bear the cost of an appeal.[143] Some defendants, such as motorists traveling through a jurisdiction, may accept an unjust fine rather than wait for an appeal.[144] Many defendants, especially those without counsel, may not be aware of their right to appeal.[145] Judges may even attempt to prevent appeals by offering suspended sentences or probation for agreements not to appeal[146] or by threatening to impose high bail[147] or to bind a defendant over to a grand jury on a felony charge unless he foregoes further litigation.[148]

Second, even if a defendant who has not received due process knows of his right to appeal and can afford the cost of an appeal, he may be unable to show specific error resulting from the trial judge's lack of expertise. A reliable record of the proceeding conducted by the lay judge may not exist. Most lower courts are courts not of record.[149] Consequently, in many jurisdictions a statement of the case is prepared by the judge.[150] But a layman who lacks the expertise to provide a trial in accordance with due process of law probably cannot provide a record with sufficient information for an appellate court to determine whether prejudicial error has occurred.[151] If a judge's lack of legal expertise leads him to rely on a prosecuting attorney for advice or summarily to reject a valid legal argument merely because it does not comport with his own common-sense notions of justice, even with an accurate record his biases will be almost impossible to prove on appeal. Furthermore, when a judge finds a defendant guilty merely because the judge cannot understand legal arguments of the defense, the defendant has not received due process of law, regardless of his guilt. Yet he may not be able to show any specific error flowing from the judge's inability to understand and evaluate the arguments.

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[143] Note, *The Justice of the Peace: Constitutional Questions*, *supra* note 30, at 325-26.

[144] Motorists passing through a jurisdiction cannot afford to spend time waiting for an appeal. *Cf.* Banyon, *supra* note 142, at 35; Bratton, *supra* note 142, at 13.

[145] *See* Note, *Metropolitan Criminal Courts of First Instance*, *supra* note 141, at 349; *cf.* Mileski, *Courtroom Encounters: An Observation of a Lower Criminal Court*, 5 LAW & SOC. REV. 473, 480 (1971).

[146] QUALITY OF JUSTICE, *supra* note 33, at 90.

[147] *Id.*

[148] *See id.*; Allen, *Small Crimes and Large Problems: Some Constitutional Dimensions*, in MASS PRODUCTION JUSTICE AND THE CONSTITUTIONAL IDEAL 74, 79 (C. Whitebread ed. 1970). Robertson, *Introduction*, in ROUGH JUSTICE: PERSPECTIVES ON LOWER CRIMINAL COURTS, xvii, xxvii (J. Robertson ed. 1974); *Metropolitan Criminal Courts of First Instance*, *supra* note 141, at 349; *cf.* Mileski, *supra* note 145, at 480. *But cf.* North Carolina v. Pearce, 395 U.S. 711 (1969) (violation of due process for trial judge to impose harsher sentence out of vindictiveness at defendant's successful appeal).

[149] *See* NATIONAL SURVEY, *supra* note 23, at 51-546.

[150] *See* Gordon v. Justice Court, 12 Cal. 3d 323, 332, 525 P.2d 72, 78, 115 Cal. Rptr. 632, 638 (1974).

[151] *Id.*

The appellate process is not likely to correct the errors inherent in a judicial system that relies on the common sense and literacy of lay judges to provide due process of law. As shown earlier,[152] it is unreasonable to assume that common sense and literacy enable a lay judge to comply with the increasingly complex requirements of fairness in modern criminal proceedings. Unless it is a per se violation of due process to force a defendant to stand trial before an untrained, unsupervised, and untested lay judge, a substantial number of those accused of petty offenses will probably lose their liberty or property without full due process of law.

The Impact of Decisions Defining Due Process. Decisions defining due process of law support the argument that a trial before an untrained, unsupervised, and untested lay judge violates due process because an appeal cannot remedy the resulting unfairness. In *Gideon v. Wainwright*[153] the Court found that a fair trial in a felony case required appointed defense counsel[154] even though the defendant had the right to appeal his conviction. *Gideon* rejected the rule of *Betts v. Brady*,[155] which had required the appellate courts to examine the facts of a case to determine whether the absence of defense counsel had actually prejudiced the defendant.[156] After *Betts*, the Court had recognized that it was impossible to know the actual degree of prejudice resulting from the denial of counsel[157] and abandoned the case-by-case approach.[158] In *Gideon* the justices concluded that a defendant "requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."[159] Led by the inadequacy of a case-by-case appellate determination of fairness and the substantial likelihood of an unfair felony trial without defense counsel, the Court declared that the denial of counsel violated the fourteenth amendment per se. *Argersinger v. Hamlin*[160] extended the rule to misdemeanor cases involving prison sentences. And the Court has found other procedures to be per se violations of due process of law because they create a substantial probability of unfairness which is not alleviated by the appellate process.[161]

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[152] *See* text at notes 45-74 *supra*.

[153] 372 U.S. 335 (1963).

[154] *Id.*

[155] 316 U.S. 455 (1942).

[156] *Id.* at 471-72.

[157] Hamilton v. Alabama, 358 U.S. 52, 55 (1961).

[158] Gideon v. Wainwright, 372 U.S. 335, 349-52 (1963) (Harlan, J., concurring).

[159] *Id.* at 345, *quoting* Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

[160] 407 U.S. 25 (1972).

[161] *See, e.g.*, Ward v. Village of Monroeville, 409 U.S. 57 (1972) (bias of mayor presiding as judge whose community's revenues relied substantially on fines collected from convictions denied fairness); Estes v. Texas, 381 U.S. 532 (1965) (presence of television cameras in

Since reliance only on the common sense of lay judges in minor criminal cases creates a substantial likelihood of unfairness not remedied by the appellate process, it is consistent with the Court's decisions defining due process of law to declare that a criminal trial before an unsupervised, untrained, untested lay judge is a per se violation of the fourteenth amendment.

3. The Cost and Efficiency of a Per Se Rule

Cost and efficiency have also affected the definition of due process of law. In *Duncan v. Louisiana*[162] the Court refused to extend the right of a jury trial to those accused of petty offenses. It noted:

> [T]he possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications.[163]

The imposition of minimum due process standards of judicial competence, however, would not necessarily detract from the efficiency of law enforcement and judicial administration; nor would it require unjustified expenditures by state and local governments. Legally trained judges should be no less efficient than untrained judges unless the efficiency provided by the latter arises from a lack of due process in minor court proceedings. Although improved judicial competence will increase the cost of state judicial systems, the cost need not be prohibitive. As shown in the following section, relatively inexpensive methods can provide legally trained or supervised judges to handle minor criminal offenses.[164]

To reduce the impact of requiring minimum standards of judicial competence, the California Supreme Court[165] and several commentators[166] have urged limiting application of the standards to cases involving prison sentences. This distinction springs from the Court's decision in *Argersinger* and

courtroom prejudiced defendant's right to a fair trial); Turner v. Louisiana, 379 U.S. 466 (1965) (continuous and intimate association with jury during trial by two deputy sheriffs who were prosecution witnesses was denial of fairness); Jackson v. Denno, 378 U.S. 368, (1964) (procedure of permitting jury to determine voluntariness of confession and then pass on defendant's guilt deemed denial of fairness); *In re* Murchison, 349 U.S. 133 (1955) (judge presiding over trial for contempt occurring in grand jury proceeding over which same judge presided denied fairness); Tumey v. Ohio, 273 U.S. 510 (1927) (trial before judge whose salary was based on fines collected through convictions denied fairness).

[162] 391 U.S. 145 (1968). *See also* Argersinger v. Hamlin, 407 U.S. 25 (1972).

[163] 391 U.S. at 160.

[164] *See* note 239 *infra*.

[165] *See* note 222 *infra*.

[166] *Id.*

implies that the threat of a fine does not justify the cost of providing a judge capable of conducting a fair trial. This suggestion fails to recognize that the right to a speedy and public trial, confrontation and cross-examination of witnesses, compulsory process, and other constitutional and statutory rights apply to all criminal proceedings whether or not the defendant's physical liberty is at stake. As Justice Powell pointed out in his concurring opinion in *Argersinger*,[167] conviction of a misdemeanor and deprivation of property can be more serious than a few days in jail.[168] Furthermore, a defendant has more need of a competent judge when there is no right to counsel than when he has a lawyer.[169]

Arguments of cost and efficiency, then, should not save the lay judge from a due process attack. A trained judge will probably be quite efficient, particularly if his training emphasizes judicial economies. As will be shown, providing a minimum level of judicial expertise does not involve prohibitive costs. Consequently, the use of the untrained, untested, and unsupervised lay judge should be considered a per se violation of due process.

IV. Remedies to Provide Due Process of Law

Once it is determined that a criminal trial before an untrained, untested, and unsupervised lay judge violates due process of law per se, it is necessary to define the type of judge required. If due process of law includes a minimum level of judicial legal expertise in criminal trials, the states need a standard so that they can administer their judiciaries in accordance with the requirements of the Constitution. A clear and precise description of a qualified judge does not yet exist. As the preceding section indicates, however, due process at least mandates a judge capable of determining and providing the minimum procedural requisites of a fair trial. In cases within his regular jurisdiction, he must produce verdicts and sentences that comport with the substantive requirements of state and federal common law, statutes, and constitutions without reliance on potentially biased outside sources. Unfortunately, these requirements leave unanswered questions: whether due process permits a state to force a defendant to stand trial before an incompetent judge if it later provides a de novo trial before a judge who meets the minimum requirements of due process, whether due process requires a trial before a lawyer-judge,[170] or whether a state can rely

[167] 407 U.S. 25, 44 (1972).

[168] *Id.* at 52.

[169] *See* text at 75-96 *supra*.

[170] This rationale underlies the California Supreme Court's decision to require lawyer-judges in all cases in which imprisonment may be imposed. *See* Gordon v. Justice Court, 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632, (1974); *accord*, Perry v. Banks, 521 S.W.2d 549, 555 (Tenn. 1975) (Henry, J., dissenting). *But cf.* Morrissey v. Brewer, 408 U.S. 471, 489 (1972)

on other methods of training, testing, or supervision to ensure that a judge meets the requirements of due process. This section examines alternative methods of meeting the general due process standards of judicial competence stated above.

The following discussion will not assert, however, that a prophylactic rule requiring a minimum level of judicial competence can guarantee due process of law. Factors besides legal expertise influence a judge in the conduct of criminal trials. Excessive caseloads encourage even the most competent judges to minimize the time devoted to protecting defendants' constitutional rights.[171] Community expectations of law and order and the politics of the selection of judges can threaten the neutrality of trained and untrained judges alike.[172] A judge's desire to enhance his own reputation

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(a judicial officer is not needed to conduct a parole revocation hearing); Shadwick v. City of Tampa, 407 U.S. 345 (1972) (lay person is capable of making a determination as to probable cause for the issuance of a search warrant).

[171] *See* THE COURTS, *supra* note 32, at 30; Mileski, *supra* note 145, at 479 (reporting that 75% of all cases studied were handled in one minute or less). *See also* L. HERMAN, THE RIGHT TO COUNSEL IN MISDEMEANOR COURT (1973); MASS PRODUCTION JUSTICE AND THE CONSTITUTIONAL IDEAL (C. Whitebread ed. 1970). This factor would not be influential in rural courts where the case load is not as great as it is in urban areas. *See* Comment, *The Justice of the Peace System Under Constitutional Attack—Gordon v. Justice Court*, *supra* note 21, at 867; NATIONAL SURVEY, *supra* note 23, at 39-43. Several methods are used. The first is to try two or more cases simultaneously. *See* Mileski, *supra* note 145, at 480. A second is to apprise defendants of their rights en masse. *See id.* at 484. A third is simply to forego informing defendants of their rights. *See id.* at 481-84. *See generally* Comment, *The Effect of Argersinger v. Hamlin on the Municipal Court of Toledo, Ohio*, 4 U. TOLEDO L. REV. 577 (1973). A fourth is to induce guilty pleas through judicial plea bargaining where the judge offers probation or a reduced sentence in return for a guilty plea, *see* QUALITY OF JUSTICE, *supra* note 33, at 55, or through judicial intimidation when the judge makes it clear that without a guilty plea the defendant will receive a stiffer sentence after trial if he is found guilty. *See id.* A fifth is to cut short the legal arguments of counsel or to continue cases which appear to be lengthy. *See id.* at 23-24.

[172] *See* MacDonald, *An Obituary Note on the Connecticut Justice of the Peace*, 35 CONN. B.J. 411 (1961); Robertson, *supra* note 148, at xxv; Note, *Metropolitan Criminal Courts of First Instance*, *supra* note 141, at 323. *See also* Levin, *Urban Politics & Judicial Behavior*, 1 J. LEGAL STUDIES 193 (1972). This predisposition is graphically revealed in a study of Boston's metropolitan courts. There the judges were observed to use as a standard of guilt merely a preponderance of the evidence rather than beyond a reasonable doubt. *See, e.g.*, QUALITY OF JUSTICE, *supra* note 33, at 82-84; Katz, *Municipal Courts—Another Urban Ill*, 20 CASE W. RES. L. REV. 87, 99-100 (1968).

The experience of at least one state, New Jersey, which requires most of its judges to be lawyers, *see* note 38 *supra*, suggests that legal training is no panacea to the problem of political influence. One of the conclusions of a study recently undertaken of its court system is that the quality of the judges in its metropolitan courts has been seriously undermined through partisan political recruitment. *See* 98 N.J.L.J. 233, 234 (1975). What this finding suggests is that judges recruited through the political process may be much more attuned to political considerations in their decisionmaking than they are to problems involved in affording defendants their right to due process of law.

and to protect appellate courts from an excessive number of appeals may prompt him to discourage appeals.[173] Although no one has studied comprehensively the effect of judicial expertise on the quality of justice in criminal trials, available research suggests that legal expertise and training do not guarantee complete fairness.[174] Over time the provision of due process in criminal trials is an "exhausting and difficult task" for an individual faced with "political, systemic, organizational, and caseload pressures."[175]

Although a minimum standard of judicial competence will not produce a perfect trial in every instance, it should alleviate the substantial likelihood of unfairness that exists when judges lack the legal expertise necessary to determine and provide the requisites of due process of law. Any due process standard of judicial expertise must ensure that a judge is competent to conduct a fair trial in the types of cases within his jurisdiction. It must not, however, require a judicial system beyond the physical and financial capacities of state governments.

A. De Novo Trials

A state might attempt to provide due process of law by continuing its use of untrained lower-court lay judges and by providing a de novo appeal from lower courts to courts with qualified judges. Many states grant such appeals to courts staffed with lawyer-judges.[176] The argument that de novo

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[173] Judges in Philadelphia's lower criminal courts, for example, at times have not informed defendants of their right to appeal. *See* Note, *Metropolitan Criminal Courts of First Instance*, *supra* note 141, at 349; *cf.* Mileski, *supra* note 145, at 480. Rather than informing defendants of their right to appeal and allowing them to make a knowing and voluntary waiver, judges in Boston's lower criminal courts occasionally have induced waivers. They have done so by offering probation or suspended sentences if the defendant waived his right. They have also done so by setting higher bail which in effect threatened jail for those who could not afford to pay it. *See* QUALITY OF JUSTICE, *supra* note 33, at 90.

[174] *See* Robertson, *supra* note 148; 98 N.J.L.J. 233 (1975).

[175] Robertson, *supra* note 148, at xxvii.

[176] The following state statutes and constitutions provide for trial de novo on appeal from minor court criminal trials: ARIZ. REV. STAT. ANN. §§ 22-371 *et seq.* (1956 & Supp. 1974); ARK. STAT. ANN. §§ 44-501 *et seq.* (1964); COLO. R. CRIM. P. 37; DEL. CONST. art. IV, § 28, *construed in* Hinckle v. State, 56 Del. 35, 189 A.2d 432 (1963); State v. Cloud, 52 Del. 439, 159 A.2d 588 (1960); IDAHO CODE § 1-2213 (Supp. 1975) (if judge at his discretion decides to hear the case de novo); IND. ANN. STAT. § 35-1-13-3 (1971); KAN. STAT. ANN. § 22-3610 (1974); KY. REV. STAT. ANN. § 23.032 (1974); LA. CONST. art VII, § 36; MD. ANN. CODE § 12-401 (1974); MASS. ANN. LAWS ch. 278, § 18 (Supp. 1975); MICH. COMP. LAWS § 774.34 (1968); MINN. STAT. ANN. §§ 488.20, 633.20 *et seq.* (Supp. 1975) (appeal from municipal court is limited to questions of law if only fine imposed); MISS. CODE ANN. § 99-35-1 (1972); MO. SUP. CT. R. CRIM. P. 22 (1975); MONT. REV. CODES ANN. § 95-2009 (1969); NEB. REV. STAT. §§ 29-611 *et seq.* (1964); NEV. REV. STAT. § 189.010 *et seq.* (1973); N.H. REV. STAT. ANN. §§ 502.18, 502-A:11-12 (Supp. 1973); N.M. STAT. ANN. §§ 36-15-1 *et seq.* (1972); N.D. CENT. CODE §§ 33-12-40 *et seq.* (1960); OHIO REV. CODE ANN. § 1905.25 (Supp. 1973); PA. STAT. ANN. tit. 42, §§ 3003 *et seq.* (Supp. 1975); TEX. CODE CRIM. PRO. arts. 44.17, 45.10 (1966); UTAH CODE ANN. § 77-57-43 (1953); VA.

appeal adequately remedies the unfairness resulting from the use of untrained judges in lower criminal courts is based on the Supreme Court's decision in *Colten v. Kentucky*.[177]

In *Colten* the petitioner attacked Kentucky's system of de novo appeal because it required him to assume the risk of a higher sentence in the trial de novo in order to receive full recognition of his constitutional rights.[178] Rejecting the challenge, the Court found no reason to believe that the de novo court dealt any more strictly with defendants who had been convicted in a lower court than it did with those who filed their cases with the de novo court in the first instance.[179] Consequently, the likelihood of judicial vindictiveness necessary to justify a prophylactic rule against stiffer sentences in de novo trials did not exist.[180] The Court noted that the two-tiered system provided a "speedy and inexpensive means of disposition of charges of minor offenses."[181] It gave defendants the option of contesting their charges in the lower courts, discovering the state's case against them, and then proceeding to de novo trials. Alternatively, they could bypass the lower courts simply by pleading guilty and then pursuing a de novo trial.[182] In *Colten* the Court appeared to endorse the Kentucky two-tiered system as satisfying due process:

> We are not persuaded . . . that the Kentucky arrangement for dealing with the less serious offenses disadvantages defendants any more or any less than trials conducted in a court of general jurisdiction in the first instance, so long as the latter are always available.[183]

Although *Colten* contains language favorable to Kentucky's system of de novo review, it does not endorse that system as an acceptable remedy for any lower court defect that creates a substantial likelihood of unfairness. The decision focuses on whether the risk of a higher sentence on appeal is an unfair barrier to those who wish to appeal; it does not permit a state to deny a defendant the right to counsel, compulsory process, cross-

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CODE ANN. §§ 16.1-132 to -36 (1975); WASH. REV. CODE ANN. §§ 3.50.380 *et seq.* (Supp. 1971); W. VA. CODE ANN. § 50-18-10 (1966); WYO. STAT. ANN. §§ 7-442 *et seq.* (1959 & Supp. 1975).

[177] 407 U.S. 104 (1972).

[178] *Id.* at 114-15.

[179] *Id.* at 117.

[180] *Id.* at 116; *see* North Carolina v. Pearce, 395 U.S. 711 (1969).

[181] 407 U.S. at 117.

[182] *Id.* at 119-20.

[183] *Id.* at 118. The Kentucky Court of Appeals in Ditty v. Hampton, 490 S.W.2d 772 (Ky.), *appeal dismissed as moot*, 414 U.S. 885 (1973), viewed this language as endorsing the Kentucky two-tiered system as a means of satisfying due process. *Id.* at 775-76. *See also* Comment, *The Justice of the Peace System Under Constitutional Attack—Gordon v. Justice Court*, *supra* note 21, at 865-66.

examination, or other basic due process rights merely because he can obtain a new trial.

The limits of *Colten*'s approval of de novo trials appear in the Court's decision in *Ward v. Village of Monroeville*.[184] In *Ward* the petitioner claimed he did not receive a trial before a neutral and disinterested judicial officer because he had been tried before the mayor of a town that obtained a substantial portion of its revenue from fines imposed in the mayor's court.[185] The respondent argued that any unfairness arising from the mayor's interest in securing revenue for the city was remedied by the petitioner's right to a de novo trial before an unbiased judge.[186] The Court rejected the respondent's argument:

> [A de novo trial] does not guarantee a fair trial in the mayor's court; there is nothing to suggest that the incentive to convict would be diminished by the possibility of reversal on appeal. Nor, in any event, may the State's trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. [The defendant] is entitled to a neutral and detached judge in *the first instance*.[187]

As indicated in *Ward*, a state cannot exempt its lower courts from the requirements of due process of law by granting all defendants the right to a de novo trial upon appeal. For several reasons a de novo trial is an inadequate remedy for the unfairness inherent in a lower court system staffed with untrained lay judges. First, as noted earlier,[188] the right of an appeal is worthless to many defendants convicted of petty offenses without due process of law. Some defendants are never aware of their right to an appeal.[189] Others settle for an unfair trial because they cannot afford the time and money required to obtain a new trial.[190] In some cases a judge may coerce defendants into waiving their right to appeal.[191] As the judge asked in *Shelmidine v. Jones*:[192]

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[184] 409 U.S. 57 (1972).

[185] *Id.* at 58-59.

[186] *Id.* at 61.

[187] *Id.* at 61-62 (emphasis added); *accord*, Tumey v. Ohio, 273 U.S. 510 (1927).

[188] *See* text at notes 141-61 *supra*.

[189] Note, *Metropolitan Criminal Courts of First Instance*, *supra* note 141, at 349; *cf.* Mileski, *supra* note 145, at 484, where the author notes finding in 26% of the cases observed that the judge did not inform the defendants of their rights.

[190] *See* Banyon, *supra* note 142, at 35; *The De Novo Procedure*, *supra* note 141, at 51; Note, *The Justice of the Peace in Florida*, *supra* note 19, at 118; Note, *The Justice of the Peace: Constitutional Questions*, *supra* note 30, at 325-26; *cf.* Bratton, *supra* note 142, at 12.

[191] *See* QUALITY OF JUSTICE, *supra* note 33, at 90; Allen, *Small Crimes and Large Problems: Some Constitutional Dimensions*, in MASS PRODUCTION JUSTICE AND THE CONSTITUTIONAL IDEAL 79 (C. Whitebread ed. 1970); Robertson, *supra* note 148, at xvii, xxxii; Note, *Metropolitan Criminal Courts of First Instance*, *supra* note 133, at 349; *cf.* Mileski, *supra* note 145, at 480.

[192] No. 224948 (3d Jud. Dist., Salt Lake Co., Utah, June 3, 1975), *summarized in* 17 CRIM.

> [M]ust a defendant incur the added expense, both in time and money, of an appeal in order to be afforded Due Process? I think not. The availability of a trial de novo on appeal does not guarantee a fair trial in the justice court, the court with which we are here dealing. Plaintiffs are entitled to Due Process and a fair trial in the first instance.[193]

Second, rather than ensuring fairness in criminal proceedings, the right to a trial de novo may increase the likelihood of unfairness in initial trials. When a defendant has the right to a de novo appeal, there are fewer restraints on the actions of judges in the first instance. When the defendant has two chances to prove his innocence, a lower court judge might feel justified in adopting a prosecutorial bias to minimize the risk of freeing a guilty man.[194] In systems employing the trial de novo remedy, the work of lower court judges rarely receives judicial review.[195] The judge can freely ignore constitutional claims, rules of evidence, common law, and statutory law without reprimand because the proceedings are not recorded.[196] The lack of restraint on the initial judge and the low incidence of appeals leads to a situation in which

> all court personnel, defendants, and eventually the community . . . come to recognize that the judge's personal power and personal prejudice overshadow established rules of law in . . . the courts.[197]

A third problem with a de novo trial remedy is the likelihood that an initial conviction will prejudice the defendant in his de novo trial. Although in *Colten* the Court did not find that a defendant's trial de novo is

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L. REP. 2282 (1975). *See also* State v. Williams (unnumbered) (Tenn. Ct. App., June 27, 1975) (rejecting the argument that de novo review was sufficient protection for a juvenile in a juvenile hearing conducted by a lay judge).

[193] *Id.*, *quoted in* Brief for the National Legal Aid and Defender Association, *supra* note 19, at 15; *accord*, Williams v. Brannen, 116 W. Va. 1, 5, 178 S.E. 67, 69 (1935). *See also* Note, *The Justice of the Peace Court in Florida*, *supra* note 19, at 118.

[194] This author personally witnessed this attitude reflected in a preliminary hearing before a district justice in Pennsylvania. The defendant was charged with possession of a controlled substance. His counsel argued that the arrest had been illegally made by a police officer outside his jurisdiction and therefore that the case should be dismissed. The attorney read directly from the *Atlantic Reporter* the relevant case supporting his argument. The judge dismissed counsel's argument, justifying his decision on the grounds that counsel could argue his case in the court of record. The irony of the case was that unbeknownst to both parties the judge's ruling was correct, notwithstanding the fact that it was based on complete ignorance, because the case cited by the attorney had been overruled by statute.

[195] *See* Robertson, *supra* note 148, at xxiv.

[196] QUALITY OF JUSTICE, *supra* note 33, at 26.

[197] *Id.* at 80. For example, judges often fail to give repeat offenders much consideration. *See* Mileski, *supra* note 145, at 80-81; NATIONAL ADVISORY COMMISSION, *supra* note 26, at 161; QUALITY OF JUSTICE, *supra* note 33, at 27.

prejudiced by a conviction in a lower court, the possibility of prejudice exists. In a trial de novo, the judge knows that the defendant was found guilty below.[198] That awareness may influence his own conduct at the trial and might be conveyed to the jury, if there is one, through his bearing and conduct.[199] Furthermore, state witnesses who have already testified in the first trial may tend to harden their positions and better resist cross-examination if the defendant decides to pursue the first trial rather than plead guilty and litigate the appeal.[200]

Fourth, if the defendant pleads guilty in the initial proceeding or is found guilty, he may suffer prejudice even if he is later exonerated in a de novo appeal.[201] A conviction may lead to parole or probation revocation,[202] driver's license suspension,[203] or difficulties in obtaining employment.[204] The injury to an individual's reputation that flows from a criminal conviction may not always disappear upon subsequent exoneration.[205]

In summary, a de novo trial does not adequately remedy the substantial likelihood of unfairness inherent in a trial before a judge who is incapable of providing a trial comporting with the requirements of due process of law. Because appeals are unlikely even if a defendant does not receive a fair trial, a de novo system encourages lower court judges to abandon the requirements of due process. If unfair convictions result, they may prejudice subsequent trials and stigmatize even those defendants later exonerated.

B. Lawyer-Judges

Proponents of a minimum due process standard of judicial competence have argued that the Court should establish a rule requiring a lawyer-judge in all criminal proceedings.[206] Although a lawyer-judge standard of competence offers the benefits of easy application and specificity regarding the

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[198] *See The De Novo Procedure*, *supra* note 141, at 41.

[199] Note, *Judges' Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality*, 61 VA. L. REV. 1266 (1975); *see The De Novo Procedure*, *supra* note 141, at 41.

[200] *See The De Novo Procedure*, *supra* note 141, at 41.

[201] *See* Argersinger v. Hamlin, 407 U.S. 25, 47-48 & nn.9-11 (1972) (Powell, J. concurring); Duke, *The Right to Appointed Counsel: Argersinger & Beyond*, 12 AM. CRIM. L. REV. 601, 615-16 (1975); Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929 (1970).

[202] *See* Duke, *supra* note 201, at 615-16.

[203] *See id.*

[204] *See id.*

[205] *See id.*

[206] *See* Brief for Appellant, *supra* note 7, at 49; Gordon v. Justice Court, 12 Cal. 3d 323, 327, 525 P.2d 72, 74, 115 Cal. Rptr. 632, 634 (1974); Ditty v. Hampton, 490 S.W.2d 772, 773 (Ky.), *appeal dismissed as moot*, 414 U.S. 885 (1973). *See also* ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO COURT ORGANIZATION § 1.26 (1974).

minimum requirements of due process, a lawyer-judge may not be essential to a fair trial. Some states presently require all their judges to be lawyers,[207] but other states have developed alternative methods of ensuring a minimum of judicial competence in criminal proceedings.[208] If these latter methods can satisfy the fourteenth amendment, the principle of federalism implicit in due process argues against the imposition of a lawyer-judge requirement.[209] The due process inquiry regarding a minimum standard of judicial competence must then address at least three questions: whether admission to the bar renders an individual competent to conduct a fair trial, whether competency can result from alternate methods, and what relationship develops between the burdens each method places upon the states. The following discussion attempts to answer the questions and to strike the balance.

A requirement that all judges in criminal trials be lawyers has several advantages. It theoretically assures that each judge is capable of determining and applying the minimum requirements of due process in criminal proceedings and provides a clear standard to guide the states. But admission to the bar is not a perfect due process standard for judicial competence because it would impose practical and financial burdens on many jurisdictions.

Admission to the bar does not necessarily indicate competence to conduct criminal trials. Bar examinations, for example, may contain few questions on criminal law and procedure.[210] Consequently, a lawyer's knowledge in these areas is rarely tested. In addition, a lawyer who passes the bar examination, but because of his civil law specialty never litigates a criminal trial, is probably not well versed in criminal law and procedure.[211] Nevertheless, one who has demonstrated enough familiarity with legal problems to gain admission to a state bar probably has the minimum level of expertise necessary to determine the requirements of due process and to make independent judgments about their application to specific cases.

The major problem with a lawyer-judge standard of competence is that it may severely limit a state's capability to staff its lower courts and substantially increase the cost of justice in minor court proceedings. Although there is an overall abundance of lawyers in the United States,[212] many areas

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[207] *See* note 36 *supra*.

[208] *See* note 132 *supra*.

[209] *See* Shadwick v. City of Tampa, 407 U.S. 345, 353-54 (1972); Fay v. New York, 332 U.S. 261, 294 (1947); Snyder v. Massachusetts, 291 U.S. 97, 116-17 (1934).

[210] In New York, for example, only one essay out of twelve on the bar examination involved criminal law; out of 160 objective questions, only ten concerned criminal law; and even fewer concerned rules of evidence. Brief for the New York State Association of Magistrates as Amicus Curiae, *supra* note 4, at 31.

[211] *Cf.* Gutman, *A Program for Judicial Education*, 7 TRIAL, May-June, 1971, at 49.

[212] *See* Argersinger v. Hamlin, 407 U.S. 25, 37 n.7 (1972). Approximately 300,000 people

have few lawyers[213] and some areas have none at all.[214] In urban centers where lawyers are plentiful, states might attract inexperienced lawyers to the bench with little extra expense.[215] But jurisdictions may have to pay

worked as lawyers in 1972. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1785, OCCUPATIONAL OUTLOOK HANDBOOK 142 (1974).

[213] *See* AMERICAN BAR FOUNDATION, THE 1971 LAWYER STATISTICAL REPORT 21-25 (1971), which breaks down by state the distribution of lawyers according to population densities beginning with cities of 25,000 and rising in some states to over 500,000. The data shows a remarkable disparity in lawyer distribution between areas of low density and areas of high density. In Utah, for example, in 1974 only 48 of the 1,561 active resident members of the bar practiced in the eleven counties comprising the fifth and sixth districts. Comment, *The Justice of the Peace System Under Constitutional Attack—Gordon v. Justice Court*, *supra* note 21, at 870. Only 18% of the attorneys practicing in the state of Oregon live in rural areas. *See Justice Courts in Oregon*, *supra* note 11, at 438.

[214] In some counties in Colorado, Texas, and Alaska there are no lawyers. *See* Oelsner, *supra* note 24, at 16, col. 4. In Petroleum County, Montana, there are no lawyers. In others there are so few as to question seriously the probability that any would be willing to serve as minor court judges. Holden, *supra* note 19, at 131 n.51. The Supreme Court recognized this problem in Shadwick v. City of Tampa, 407 U.S. 345, 352-53 n.10 (1972), when discussing the need in some areas for laymen to issue search warrants instead of judges. This point also concerned Justice Powell, concurring in Argersinger v. Hamlin, 407 U.S. 25, 60-61 (1972). He argued that furnishing counsel to indigents may be practically impossible in some rural areas. The majority felt they answered Justice Powell's concern with statistics showing that there was a large and growing number of attorneys. *Id.* at 37 n.7. It would seem from the majority's view that the argument that there may be insufficient lawyers to serve as judges would have little impact on a decision whether to require lawyer-judges.

[215] Lawyers that had just graduated from law school or who had at least one year of professional experience earned in 1972 an average of $13,498 and $14,640 respectively. *See* U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1764, NATIONAL SURVEY OF PROFESSIONAL, ADMINISTRATIVE, TECHNICAL, AND CLERICAL PAY 14 (Table 1)(1973). Such amounts coincide with the salaries paid judges in the following state courts: Alaska magistrate, $3,500-20,000; Arizona justice, up to $14,000; Arkansas municipal, $2,400-22,500. California district, $1,200-32,005; Colorado county, $2,000-25,000; Delaware justice, $10,000; Florida county, $24,000-28,000; Hawaii district, $24,200; Idaho magistrate division of district court, $12,500-13,500 (lay judges), $16,500-18,500 (lawyer judges); Kansas magistrate, up to $20,500; Kentucky county, up to $9,600; Maine district, $23,000; Maryland district, $30,175; Massachusetts district, $7,600-25,000; Michigan district, $18,000-27,500; Minnesota municipal, $600-29,000; Mississippi county, $5,400-20,000; Missouri magistrate, $16,200-22,400; Montana municipal, $3,000; Nebraska county, $20,000-27,500; Nevada justice, $300-15,000; New Hampshire district, $2,900-24,000; New Jersey municipal, up to $17,500; New Mexico magistrate, $3,800-15,000; North Carolina district, $23,500; North Dakota county justice, up to $5,000; Ohio county, $4,000-10,000; Oregon justice, up to $10,608; Pennsylvania district justice, $6,000-16,500; Rhode Island district, $5,075; South Carolina magistrate, $500-3,000; Texas justice, up to $22,680; Utah municipal, $12,000-18,900; Virginia district, $25,650 (county courts); Washington justice, up to $20,000; Wyoming justice, $2,500-7,200. *See* COUNCIL OF STATE GOVERNMENTS, STATE COURT SYSTEMS REVISED 26-31 (1974).

The use of lawyers newly graduated from law school is not unlikely. In Iowa, for example, where the pay for a full-time magistrate is $17,200 and $4,800 for part-time, 42.3% of lawyer-magistrates had been practicing for two years or less. Green, Ross, & Schmidhauser, *supra* note 24, at 382, 384. The salary provided a steady and substantial income to those young

premiums[216] to attract lawyers to be resident judges in many rural areas presently served by lay judges.

A lawyer-judge requirement also may force states to resort to circuit-riding lawyer-justices in areas with light caseloads and few lawyers[217] or to consolidate fragmented court systems into units that generate enough cases to justify a full-time lawyer-judge.[218] Such institutional changes would deprive defendants of the benefit of speedy lower court adjudications.[219] Defendants charged with traffic violations may have to wait until a circuit-riding justice arrives or travel a great distance to a consolidated court.

The inconvenience to defendants who value a speedy trial more than a lawyer-judge might be eliminated by making the right to a minimum level of judicial expertise waivable as the California court did in *Gordon v. Justice Court*.[220] By waiving their rights to a lawyer-judge, defendants would reduce the practical and financial burdens of a lawyer-judge requirement and might prompt lay judges to increase their expertise in order to attract defendants and justify their existence. The effects of permitting waiver of the right to a minimum of judicial expertise, however, are uncertain. Political pressures may not prevent excessive leniency if a judge feels the need to attract cases in order to preserve his job. If the judge, rather

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lawyers just beginning to practice. The study also revealed that most lawyer-magistrates continued to practice law. *Id.* at 384. Thus, it is not likely that young lawyers are available at current salaries where judges are barred from the practice of law.

[216] The increase in cost for lawyers' salaries may be partially offset by increased efficiency. If lawyers are able to provide fairer trials, there will probably be fewer appeals, thereby relieving the appellate courts of part of their caseload. Lawyer-judges may also aid appellate courts if their command of the law leads them to bind over fewer defendants on felony charges and to hear more of the cases brought before them. A state might take advantage of increased judicial competence in minor courts by expanding their jurisdiction and relieving the higher court caseload. Finally, if lawyer-judges are required in all cases, there may be no need to extend the right to counsel to all criminal offenses, and the states would be spared the expense that would be involved if the right to counsel were to be extended.

[217] *See* Holden, *supra* note 19, at 127, 131; Brief for the Kentucky Bar Association as Amicus Curiae at 13, Ditty v. Hampton, 490 S.W.2d 772 (Ky.), *appeal dismissed as moot*, 414 U.S. 885 (1973). This approach was taken by California shortly after the state supreme court handed down its decision in Gordon v. Justice Court, 12 Cal. 3d 323, 525 P.2d 72, 115 Cal. Rptr. 632 (1974). Twenty-two attorneys were appointed as circuit judges to assist in areas presided over by 127 lay district judges. Each judge received a salary of $30,000. *See* Kleps, *Contingency Planning for State Court Systems*, 59 JUDICATURE 63, 65-66 (1975).

[218] NATIONAL ADVISORY COMMISSION, *supra* note 26, at 162; *see* ABA SECTION OF JUDICIAL ADMINISTRATION, THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 99 (4th ed. 1961); Sunderland, *supra* note 19, at 327. See also Gazell, *Lower-Court Unification in the American States*, 1974 ARIZ. ST. L.J. 653, for a survey of state changes.

[219] *See* Note, *The Justice of the Peace in Florida*, *supra* note 19, at 332; Comment, *The Justice of the Peace System Under Constitutional Attack—Gordon v. Justice Court*, *supra* note 21, at 869.

[220] 12 Cal. 3d 323, 333-34, 525 P.2d 72, 79, 115 Cal. Rptr. 632, 639 (1974).

than a neutral officer, has the responsibility of ensuring a knowing and intelligent waiver, he may discourage defendants from asserting their right to a trial before a judge who meets the minimum due process standard of judicial competence.[221]

A jurisdiction could also minimize the impact of a lawyer-judge requirement by limiting it to trials with potential verdicts of incarceration. The California Supreme Court has adopted this limitation in addition to permitting waivers.[222] If trials not involving potential jail sentences are exempt from any minimum due process standard of judicial expertise, states could preserve their systems of lay judges by restricting lay judge jurisdiction to charges involving only fines. Petty offenses involving prison sentences could be transferred to the nearest court with a lawyer-judge.[223] Limiting the requirement of minimum judicial expertise to trials involving imprisonment, however, deprives defendants of competent judges when they need them most. As noted earlier,[224] in those cases involving no threat of imprisonment, defendants cannot claim the right to counsel and therefore need a competent judge to protect their rights. Finally, the limitation is suspect because a conviction and fine may be at least as harmful as imprisonment.[225]

C. *Training and Testing Programs*

As an alternative to the lawyer-judge remedy, training and testing programs can provide competent judges without creating unreasonable practical and financial burdens. In fact, such programs may ensure a minimum level of judicial capability more reliably than a lawyer-judge requirement.

A training program patterned after New York's training system[226] would

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[221] For example, the judge could imply that a more lenient sentence would be imposed if he waived his right. *Cf.* QUALITY OF JUSTICE, *supra* note 33, at 52. He might also try to intimidate by threatening higher bail. *Cf. id.* at 53.

[222] *See* Gordon v. Justice Court, 12 Cal. 3d 323, 326, 525 P.2d 72, 73, 115 Cal. Rptr. 632, 633 (1974). But the holding is not clear. The decision might require a lawyer-judge whenever the offense charged permits the imposition of a jail sentence. *See* 28 VAND. L. REV. 421, 428 (1975). It might, however, permit a lay judge to conduct trials involving offenses with possible jail sentences as long as he does not impose jail sentences.

[223] Gordon v. Justice Court, 12 Cal. 3d 323, 334, 525 P.2d 72, 79, 115 Cal. Rptr. 632, 639 (1974); *see* Brief of the Kentucky Bar Association as Amicus Curiae at 13, Ditty v. Hampton, 490 S.W.2d 772 (Ky.), *appeal dismissed as moot*, 414 U.S. 885 (1973).

[224] *See* text at notes 75-96, 169 *supra*.

[225] *See* text at note 168 *supra*.

[226] The New York program, established in 1962 after a constitutional amendment and implementing legislation, required all non-attorneys to complete a training course prior to assuming office. The administrative board of the New York Judicial Conference has responsibility for the New York program. It has organized five instructional centers located at law schools within the state. The program in each is coordinated with a master program originating from the central administrative office. INSTITUTE OF JUDICIAL ADMINISTRATION, JUDICIAL EDUCATION IN THE UNITED STATES 142-47 (1965).

certify judicial competence with a minimum of cost and institutional disruption. The New York program consists of forty hours of instruction—thirty-two hours of civil and criminal procedure, evidence, jurisdiction, and venue; six of substantive law; and two of miscellaneous subjects.[227] A continually revised curriculum reflects recent developments in the state legislature and state courts.[228] Teachers supplement their lectures with demonstrations of civil and criminal trials, preliminary hearings, arraignments, and jury selection.[229] During the demonstrations the trainees practice ruling on motions, and they compare their decisions with those of their instructors.[230] The program also requires each trainee to resolve a legal problem by using statutory and case materials.[231] In this way the prospective judges are exposed to the use of legal analysis to resolve legal questions. After a judge reaches the bench, the training continues with the state offering seminars, further demonstrations, and simulated trials.[232]

A requirement that all judges attend a training program alone, however, does not alleviate the problem of judicial incompetence. An acceptable certification program must include a test. An examination measuring substantive knowledge of criminal law, procedure, and trial practice, as well as the ability to analyze legal issues, is the only reliable indication that an individual has actually acquired judicial expertise.[233] The test could take several forms. An objective part could examine the trainee's grasp of substantive law and procedure. Discussion questions could measure his analytical skills, including his ability to recognize legal issues and to resolve them using legal precedent and principles.[234] Attaining a minimum

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[227] *Id.* at 151-52. See also *Justice Courts in Oregon*, *supra* note 11, at 450, for a proposed training program for justices of the peace; Brownlee, *The Revival of the Justice of the Peace in Montana*, 58 JUDICATURE 373 *passim* (1975), for a description of Montana's use of a training program for lay judges; Guthrie, *Administration of the District Justices of the Peace from a County Point of View*, 44 PA. B.A.Q. 517 *passim* (1973), describing a county's education plan for lay judges; Jacowitz, *Education and Training of Justices of the Peace Prior to Assuming Office—A Proposal*, 35 N.Y. ST. B.J. 61 (1963); Ronayne, *Law School Training for Nonlawyer Judges*, 17 J. LEGAL ED. 197 (1964).

[228] INSTITUTE OF JUDICIAL ADMINISTRATION, *supra* note 226, at 152.

[229] *Id.* at 154.

[230] *Id.*

[231] *See id.*

[232] *Id.* at 156.

[233] Training alone would not satisfy due process because it could not guarantee that a trainee actually acquired judicial expertise.

[234] A test like this has been used in California for more than two decades. In 1970 the test was forty percent objective and sixty percent discussion questions. Hennessy, *Qualification of California Justice Court Judges: A Dual System*, 3 PAC. L.J. 439, 450 (1972). However, the state supreme court considered it insufficient to guarantee the level of competence needed to preside over criminal trials in its district courts. *See* Gordon v. Justice Court, 12 Cal. 3d 323, 329-30, 525 P.2d 72, 76, 115 Cal. Rptr. 632, 636 (1974).

score would establish the presumption that the trainee has sufficient knowledge and skill to fulfill satisfactorily the decisional duties of a judge. Those who could not achieve that score would not qualify for the bench.

A state could supplement a written test with either an oral[235] or a practical examination.[236] An oral examination would measure the trainee's ability to respond to the problems normally arising in oral argument. For instance, the examiner could request oral rulings on whether evidence must be suppressed because police seized it in a search without a warrant or probable cause or whether the prosecutor could admit a defendant's confession given under duress.

The practical examination could place the prospective judge in a simulated trial setting. As the participant plays the role of a judge, the examiners could assess the appropriateness of his responses to legal problems arising during trial. They could also measure his ability to rule on motions of counsel and to deliver instructions to a jury. Such a practical examination would best judge an individual's ability to fulfill the decisional role of a judge in a trial setting.

Training and testing as described above can both enhance and measure an individual's understanding of the substantive and procedural requisites of a fair trial and his ability to apply them in a trial setting. Such processes therefore can indicate an individual's judicial competence more accurately than a bar examination containing only a few questions about criminal law and procedure. The programs need not require judges to demonstrate the ability to conduct perfect trials in every instance.

Due process does not require absolute accuracy.[237] Instead, judges need only demonstrate a level of expertise sufficient to prevent the substantial likelihood of judicial unfairness at trial. Judges with jurisdiction over traffic cases, municipal ordinance violations, and petty misdemeanors, for instance, would take tests on the legal issues normally arising in those types of cases. The examinations would not measure the ability to resolve complex constitutional, statutory, and common law issues of first impression. Defendants choosing to present unique or difficult arguments do not face an unreasonable burden when the court of first impression does not grasp the arguments and they must appeal. A minor court judge can prevent a substantial probability of unfairness from arising when he has

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[235] California has used an oral examination, not to measure the absolute level of a layman's competence, but to distinguish the best three candidates for a judicial position when more than three have qualified through a written examination. Hennessy, *supra* note 234, at 450-51.

[236] *See* text at notes 229-31 *supra*.

[237] "[T]he Fourteenth Amendment does not 'assure . . . immunity from judicial error . . . .'" Beck v. Washington, 369 U.S. 541, 554-55 (1962), *quoting* Milwaukee Electric Ry. & Light Co. v. Wisconsin *ex rel.* City of Milwaukee, 252 U.S. 100, 106 (1920).

demonstrated the ability to understand and apply established legal principles such as the rights to confront opposing witnesses, to invoke compulsory process, to have counsel, not to incriminate oneself involuntarily, and to be secure from unreasonable searches and seizures.[238]

A well planned training and testing system could attain the above goals without burdening the states with the expense of staffing minor courts with overly qualified individuals. The state could adjust the minimum requirements of competency according to the scope of a court's jurisdiction and could calibrate salaries to attract qualified individuals to the available positions. New York's experience indicates that the cost of training and testing programs is not prohibitive.[239] Nor will it limit a state's capacity to staff its lower courts. Although a strict lawyer-judge requirement may deprive rural areas of resident judges, a training and testing system can increase the ability to staff lower courts in rural America. A state could require lawyer-judges when they are available[240] and could rely on certified

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[238] To assure that a judge is competent when he takes office, the examination should take place shortly before that time. The following states have a testing requirement for non-attorneys: California, CAL. GOV'T. CODE § 71601 (West 1964); Pennsylvania, PA. CONST. art. V, § 12(B); PA. STAT. ANN. tit. 42, § 1217 (1975-76); *see* Kephart & Spivack, *A History of the District Justice System in Pennsylvania*, 44 PA. B.A.Q. 512 (1973); Washington, WASH. REV. CODE ANN. § 3.34.060(c) (Supp. 1974). New York in effect has such a requirement since it requires its lay magistrates to pass an examination in order to complete the course of instruction required by law. Brief for the New York State Association of Magistrates as Amicus Curiae, *supra* note 4, at 11.

[239] New York in 1965 trained its lay judges for $37.50 each. INSTITUTE OF JUDICIAL ADMINISTRATION, *supra* note 226, at 158.

[240] In some areas and some courts a state might require more than bar admission. The following states, for example, require a specified number of years of legal practice in order to be eligible to serve in a particular state minor court. *Arkansas*, municipal court: six years with at least four in Arkansas, ARK. STAT. ANN. §§ 22-704 (1962), 22-704.4 (Supp. 1973); *Delaware*, Municipal Court of Wilmington: five years in Delaware, DEL. CODE ANN. tit. 10, §1702 (1974); *Georgia*, court of ordinary in counties over 196,000 population (1970 census): three (or served as a clerk of that court for five) consecutive years preceding election, GA. CODE ANN. § 24-1711.1 (Supp. 1974); city, county, and municipal courts: three years, *id.* § 24-2111a (1971); *Hawaii*, district court: five years in Hawaii, HAWAII REV. STAT. §604-2 (Supp. 1974); *Indiana*, Marion County Court: five years in Indiana and three years in county (as attorney or judge), IND. ANN. STAT. 33-6-1-12(a) (1975); *Louisiana*, city court: five years in Louisiana, LA. REV. STAT. ANN. § 13:1873 (1968); Traffic Court of New Orleans: five years in Louisiana, LA. CONST. art. 7, §94(II)(b); Municipal Court of New Orleans: five years in Louisiana, LA. REV. STAT. ANN. § 13:2492 A (1968); *Maryland*, district court: five years in Maryland, MD. ANN. CODE art. 26, § 144a (1973); *Michigan*, court of common pleas: four years in Michigan, MICH. COMP. LAWS ANN. § 728.3 (1968); *Mississippi*, county court: five years in Mississippi, MISS. CONST. art. 6, § 154, MISS. CODE ANN. §9-9-5 (1972); *New Jersey*, county district court: ten years in New Jersey, N.J. STAT. ANN. § 2A:6-8.1 (Supp. 1975-76); *New York*, county court, district court, and city court: five years in New York, N.Y. CONST. art. 6, § 20; New York City criminal court: ten years in New York, N.Y.C. CRIM. CT. ACT § 22 (McKinney 1963); *Oklahoma*, municipal criminal court of record: four years (lawyer or judge) in Oklahoma, OKLA. STAT. ANN. tit. 11, § 783 (Supp. 1974-75), OKLA. CONST. art. 7, § 8(g);

lay judges when lawyers are scarce.[241] It could also reduce the cost of supplying lawyer-judges when a lawyer's expertise is not necessary by permitting laymen to serve in any court for which they are qualified.

A rule permitting states to develop their own tests to certify reasonably competent judges may seem hopelessly vague. The danger certainly exists that a state desiring to retain its untrained lay judiciary may set standards to ensure an adequate supply of judges rather than minimally competent judges.[242] As a result, the federal courts may face the burden of state-by-state evaluation of testing programs. But the programs would be at least as precise as bar standards, which vary from state to state. A case-by-case application of a reasonableness test may be a difficult task, but it is not a task beyond the competence of federal courts, which engage in the application of general statutes to specific factual situations routinely. Federal courts already evaluate testing programs in employment discrimination cases.[243] If the states prove unwilling or unable to design testing and training programs reasonably calculated to produce competent judges, the Supreme Court could then adopt a lawyer-judge requirement. But the threat of state-by-state evaluation should not automatically make training an unacceptable remedy.

In summary, a lawyer-judge is not essential to fairness in all criminal proceedings. By successfully completing a training and testing program reasonably calculated to produce competent judges, a lay judge can satisfy the fourteenth amendment. By possessing a minimum level of legal expertise, he will be able to alleviate the likelihood of unfairness inherent in

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Vermont, district court: five out of ten years preceding appointment, VT. STAT. ANN. tit. 4 §602(b) (Supp. 1975).

Experience may be an important factor since the role of a judge requires that he have wide ranging analytical power, mastery of legal procedures and evidence, unusual discernment in weighing conflicting facts, and unusual skills in communications. Jones, *The Trial Judge—Role Analysis and Profile*, in THE COURTS, THE PUBLIC & THE LAW EXPLOSION 121, 143 (H. Jones ed. 1965); *See* H. LUMMUS, THE TRIAL JUDGE 7-8 (1937).

[241] This is the system used in appointing federal magistrates, *see* note 29 *supra*. The federal system does not require, however, that laymen demonstrate their competence by passing an examination. If the Court sets up such a requirement, it would appear that Congress would be required to establish a testing program along with the states.

[242] This appears to have happened in California when their testing system was first introduced in 1952. Ninety-three percent passed. In subsequent years, however, it became more difficult: 73% passed in 1958; 61% passed in 1964; and 45% passed in 1971. *See* Hennessy, *supra* note 234, at 449 n.53, 450.

[343] *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971); Rogers v. International Paper Co., 510 F.2d 1340, 1345 (8th Cir.), *petition for cert. filed*, 44 U.S.L.W. 3039 (U.S. June 22, 1975) "Where objective criteria are employed the EEOC guidelines . . . control. They require generally that empirical evidence must demonstrate a significant correlation between the test employed and important elements of work behavior."); Walston v. County School Bd., 492 F.2d 919, 924-27 (4th Cir. 1974); United States v. Georgia Power Co., 474 F.2d 906, 912-17 (5th Cir. 1973).

trials before incompetent judges. Such a program provides a due process remedy less burdensome than a lawyer-judge rule. Consistent with America's federal system of government, then, the federal judiciary should allow the states first to train and test their judges.

D. Supervision of Judges

Another potential remedy for the likelihood of unfairness resulting from judicial incompetence is supervision of minor court judges. A study of Oregon justices of the peace concluded that supervision by circuit court judges was the most appropriate remedy for the lack of legal expertise of Oregon lay judges.[244] Although a knowledgeable supervising judge may provide a reliable, unbiased source of information, he cannot sufficiently minimize the probability of unfair decisions. Unless the supervisor participates in each stage of the criminal process, the lay judge will have to ask for advice about the conduct of a fair trial. But an untrained lay judge, who is not capable of recognizing the issues of a case or identifying the problems for which he must seek information, will not know what to ask his supervisor. Even if he recognizes the issues, his legal ignorance or bias[245] may prompt him to proceed without advice and thereby to render an unfair decision. Either way, defendants do not receive due process of law because the judge cannot provide the requisites of a fair trial.

V. Conclusion

Unless a defendant receives a judge who can determine and apply the substantive and procedural requirements of due process of law, there is a substantial likelihood that the accused will not receive a fair trial. Since the due process clause of the fourteenth amendment prohibits conducting criminal proceedings in a manner that creates a substantial likelihood of unfairness, a trial before a judge not capable of providing due process violates the fourteenth amendment per se. In order to comply with the amendment, the states must act to ensure that all their judges meet the standard of judicial competence implicit in the fourteenth amendment. They need not require that all judges be lawyers, however, because a lawyer-judge standard of competence involves serious financial and practical difficulties and is not the only acceptable standard. In the alternative, states could establish training and testing programs designed to produce a competent judiciary. By developing skills directly related to both the substantive law and the trial procedure of minor courts, such programs could satisfy the fourteenth amendment efficiently. States could adapt

[244] *Justice Courts in Oregon*, *supra* note 11, at 428-31.

[245] *See* text at notes 70-74 *supra*.

instruction and testing to fit the peculiar needs of their judiciaries. Their programs could therefore ensure due process more precisely than a lawyer-judge rule, and the fourteenth amendment could be satisfied with deference to the policies of federalism embodied within the due process clause.

C.B.S.